

No. 9553

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

JOSEPH GOLDIE,

Appellant,

vs.

STERLING CARR, Receiver of Estate of
Herbert Fleishhacker, Debtor,

Appellee.

REPLY BRIEF FOR APPELLANT.

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Attorneys for Appellant.

FILED

SEP 26 1940

PAUL P. O'BRIEN,

CLERK

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REPLY BRIEF FOR APPELLANT.

After the case at bar was docketed in the above entitled court, appellee filed a notice of motion to dismiss the appeal herein. This motion has not been passed upon as yet, it having been set forward for hearing at a later date by Senior Circuit Judge Wilbur.

It is the intention of the court, we assume, to pass upon the motion to dismiss contemporaneously with the consideration of the appeal. We will, therefore, make our argument opposing appellee's motion to dismiss in this, our reply brief, especially as appellee has elected to brief this point in his brief under Caption I of his Argument. (Appellee's brief, page 6.)

I.

THE ORDER OF THE DISTRICT COURT APPEALED FROM WAS INTERLOCUTORY ONLY IN PART. IT IS FINAL AS TO THE REFEREE'S HOLDING THAT:

“Said respondent [appellant], at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver [the receiver's petition for an order to show cause directed to appellant], was and now is acting as a trustee of said debtor.” (Record page 76.)

“Joseph Goldie, at the time of the filing of the petition by said debtor and also at the time of the filing of said petition by said receiver [the receiver's petition for an order to show cause directed to appellant], was and now is indebted to the debtor . . .” (See referee's opinion, findings, conclusions and order, Record page 76.)

From the foregoing findings the referee reached conclusions of law which were without opinion affirmed by the District Court, one of such conclusions being:

“That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, *a trustee of said debtor.*” (Emphasis ours.)

It may be seen from the foregoing that the referee found as a fact that appellant was indebted to the debtor, and concluded as a matter of law that appellant was acting as a trustee for said debtor, these findings and conclusions being in addition to his

finding that the bankruptcy court had summary jurisdiction over appellant.

True, the referee held that appellant might offer such further competent evidence on the merits as appellant might be desirous of offering and proffered the process of the court to appellant to produce such evidence.

But such process or evidence will avail appellant nothing to show that he was not, in fact, a debtor of the estate of Mr. Fleishhacker, and will avail him nothing to show that he is not nor ever was a *trustee* for Mr. Fleishhacker for the questions both as to fact and law were decided adversely to him in the order here appealed from.

The case upon which appellee so heavily leans to support his contention that this court cannot entertain this appeal is that of *Pearson v. Higgins*, 34 Fed. (2d) 27, 14 Am. B. R. (N. S.) 386. Attorneys for the appellee in that case are the same as for appellant in the case at bar.

This court, on petition for rehearing in the *Pearson* case, said:

“By petition for rehearing, it is contended that we erred in impliedly holding or assuming that no ‘turn over’ order had been made . . .

“The action taken by the referee, and affirmed by the district judge, we do not think was intended to have such effect, nor from the oral argument did we get the impression that counsel for the appellants otherwise construed the record.

But owing to the failure to enter any formal order, we find, upon further examination, that the record exhibits a measure of confusion and uncertainty . . .

“Upon the record as made, the referee might properly have taken the appellants’ announcement of intention to petition for a review as an implied declaration that they intended to stand on their plea, and entered such a turnover order as by default; but in his certificate to the district judge on petition for review he disclaimed any intention to adjudicate the merits of the claim of title . . .

“However, because of the confusion and uncertainty and to protect the parties against the possible injustice which might result therefrom, we choose to entertain the question raised by the ruling on the plea to jurisdiction.” (Italics ours.)

We respectfully submit that in the case at bar the referee and the district judge affirming him went far in excess of a simple ruling on appellant’s objection to the jurisdiction of the bankruptcy court to proceed summarily, for in addition to overruling the plea to the court’s jurisdiction, the referee held (and was affirmed by the district judge) that not only did the court have summary jurisdiction over appellant but that appellant was indebted to Mr. Fleishhacker and, in addition, was Mr. Fleishhacker’s trustee, closing the door thereby to the right of appellant upon a hearing on the merits to show that he was neither indebted to Mr. Fleishhacker nor was he in any sense a trustee of Mr. Fleishhacker.

There was no issue before the trial court except the one of jurisdiction, or the lack of it, and the effect of the referee's order, if affirmed, would be to deprive appellant of the major parts of his meritorious defense, to-wit, the existence of a trust with appellant the trustee and the existence of a debt with appellant the debtor.

From the present state of the record, if this court holds that summary jurisdiction is lacking, the appellee, receiver, still has his full remedy in a court of plenary jurisdiction and appellant has his day in court controlled by the rules of orderly legal procedure.

On the other hand, if this court affirms the order of the referee and District Court, two findings of the referee on the *merits* of appellant's case are thereby adjudicated against him.

We respectfully urge that the motion to dismiss the appeal herein should be denied on the grounds that the referee's order was more than interlocutory and attempted to adjudicate substantially meritorious elements of appellant's defense.

POINT II OF APPELLEE'S ARGUMENT.

This contention of the appellee is extremely novel.

Appellant is haled into court on the process issued on appellee's petition. Objection to the court's jurisdiction is made and the facts disclosing the lack of jurisdiction are pleaded so as to permit the inquiry

as to jurisdiction or the lack of it to be held and with a prayer that service of the process be quashed.

Appellee, with earnestness if not conviction, asserts that this manner of raising the point waives the very right sought to be invoked by appellant.

We call the court's attention to the failure of appellee to even attempt an answer to the case of *Bake-Rite Consolidated*, 6 Am. B. R. (N. S.) 503, 12 Fed. (2d) 648, cited and quoted from in our opening brief, which case clearly and effectively disposes of this point adversely to appellee's contention.

POINT III OF APPELLEE'S ARGUMENT.

Brought into court on an order to show cause issued pursuant to an ex parte petition of the appellee herein, appellant filed an objection to the court's jurisdiction over him.

The appellee introduced evidence on which he relied to disclose the presence of summary jurisdiction. Appellant introduced evidence on which he relied to disclose the lack of summary jurisdiction over him.

This act of appellant (introducing evidence through witnesses) appellee asserts was a waiver of the objection of appellant to the court's summary jurisdiction. But Judge Kerrigan said, in *Bake-Rite Consolidated*, *supra*:

“In determining that question [of jurisdiction] it may be necessary *to examine into the merits of the controversy*. (Citing cases.)” (Emphasis ours.)

Assuming that Judge Kerrigan's statement in the case just quoted is a correct statement of the law, how then would appellee have such an examination conducted? Must appellant Goldie, with vital and substantial rights at stake, be an actor without a line to speak? A litigant without voice? The star chamber might as well become a part of our legal procedure as to give judicial sanction to such a doctrine.

POINT IV OF APPELLEE'S ARGUMENT.

On this point appellee states that at the time Herbert Fleishhacker filed his petition under Chapter XI and also at the time of the filing of the petition by the receiver for a summary order against appellant, appellant was and now is acting as trustee of the debtor, Herbert Fleishhacker. The corporate stock of Rainer Brewing Company and its dividends which the receiver seeks to summarily seize through an order against appellant has not been in the possession of appellant, either actively or constructively, since the year 1933 (Record page 61), long antedating the debtor's petition herein. In 1933, this stock was pledged by appellant to the Anglo California National Bank and there it has since remained.

Following the making of the contract of September 29th, 1937, a joint effort was made by appellant and Mr. Fleishhacker to obtain a release from pledge of the three thousand (3000) shares of this stock and deliver it to Mr. Fleishhacker. In this effort they failed. The pledgee bank refused to release the stock

although requested to do so by both the appellant and Mr. Fleishhacker. At the time Mr. Fleishhacker's petition in bankruptcy was filed Mr. Fleishhacker was not in possession, either actively or constructively, of this stock and, as said above, neither was Mr. Goldie. It was in the possession of Mr. Goldie's pledgee, the Anglo California National Bank, where it is today.

The pledgee bank is not a party to the proceedings in the case at bar and any final order made herein against Goldie in the summary proceeding at bar could not affect the pledge or the rights of the bank to the pledged property. (Record page 61.)

It is apparent from the foregoing statement of fact, which will not be disputed, that the assertion in Point IV of appellee's brief that Mr. Goldie was acting as trustee for the debtor, in so far as it relates to the stock certificates themselves, cannot be true. The existence of a trust presupposes that Joseph Goldie has the possession of the stock and that the ownership of it is in Mr. Fleishhacker.

As we have shown above, the possession of the stock is in the pledgee bank, which is not a party to the proceedings at bar.

The citation of the general principles of law contained in appellee's brief under Point IV can lend no aid to the court in the determination of the question as to whether or not summary jurisdiction exists in the bankruptcy court to require the delivery by Joseph Goldie of this stock and its dividends over to the receiver.

The United States Circuit Court of Appeals for the Second Circuit as recently as July 15, 1940, in the *Matter of Richard Whitney et al., Bankrupts*, 43 Am. B. R. (N. S.) 158, 113 Fed. (2d) 426, held squarely on the point that where there is a relationship of trust between the bankrupt and a third party the bankruptcy court did not have summary jurisdiction to determine the rights of the trustee in bankruptcy and the trustee under the trust. In that case, the Circuit Court of Appeals said:

“The interest of the beneficiary of a trust who becomes a bankrupt is not treated as an ordinary chose in action and regarded as in the constructive possession of the bankruptcy court, but the trustee who holds a res on behalf of the bankrupt is classed as an adverse claimant.”

In the last paragraph, at page 20 of appellee's brief, on this point, appellee does an about-face from his assertion that Goldie is acting as the debtor's trustee and states primarily that there is a debt due the bankrupt estate from Goldie. To say that Goldie is the trustee for the debtor estate in one breath and that he is its debtor in another is self-contradictory. If Mr. Goldie is acting as trustee for the bankrupt estate there is no relationship of debtor and creditor. If he is the debtor of the bankrupt estate, there is no relationship of trust. But in support of this assertion that the bankruptcy court has summary jurisdiction over Mr. Goldie to require him to pay a debt to the bankrupt estate, the appellee has again cited, as the referee did in his certificate,

Orinoco Iron Company v. Metzel, 230 Fed. 40. The *Orinoco Iron Company* case does not lay down the rule of law which the appellee states it does. It holds simply that where there is a controversy between two persons, the bankruptcy trustee and another, each claiming an ownership of an account receivable, the bankruptcy court has summary jurisdiction to determine which of these two persons is the actual owner. The person from whom the fund was to be collected made absolutely no claim to it. It is, therefore, readily apparent that this case is not authority for the assertion of appellee that accounts receivable or choses in action are collectible by summary action in the bankruptcy proceeding. The rule is just the contrary, as we will show.

In the *Orinoco* case, *supra*, the United States was the debtor and the litigation was between two other persons one of whom was the trustee in bankruptcy claiming the fund held by the United States. The United States made no claim to the fund and the bankruptcy court was held to have summary jurisdiction over the persons who did claim it, one of whom was an officer of the bankruptcy court, to determine to which one of these the fund was payable, the United States being ready to pay it to either of them.

The second case cited by appellee in support of the foregoing proposition is *In re Ransford*, 28 Am. B. R. 78, 194 Fed. 654 at 658. Neither does this case support the rule of law for which it is cited in appellee's brief. There it was held:

“The proceeding in the District Court was a controversy between the trustee in bankruptcy and

the petitioner as to which was entitled to receive payment from the garnishee defendant of the indebtedness primarily owing to the bankrupt's estate. The rights of a garnishing creditor can be no greater than those of an attaching creditor and if the rights of the latter are voided by the bankruptcy proceedings the same must be true of those of the former . . .

“We think, for the purposes of this suit, the debt should be regarded as constructively in his possession and that the District Court had jurisdiction to proceed summarily to determine the rights of the parties.”

The *Ransford* case, in like manner as the *Orinoco* case, simply holds that where the third person makes no claim that as between two others claiming, one of whom is a trustee, the obligation is constructively in the possession of the trustee and its ownership may be summarily determined. Neither of these cases holds, as between an officer of the bankruptcy court as the creditor, on the one hand, and an asserted debtor, on the other hand, that the bankruptcy court has summary jurisdiction over the debtor. The opposite is the settled law.

In the *Matter of W. R. Ballou*, 33 A. B. R. 21, 215 Fed. 810, was a case where a summary proceeding was instituted to require the delivery by a third person of corporate stock in a corporation to a trustee in bankruptcy. The respondent to the order to show cause in that case was in exactly the same position as the appellant in the case at bar, except that in the

Ballou case the respondent did not raise the question of the referee's jurisdiction until after an order on the merits adverse to him had been made. The District Court on review said:

"I am, however, clear that the referee had no jurisdiction of the proceeding and that it is not now too late to raise the question. This was not a case for a summary proceeding. A summary proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third person to the trustee. *It is not proper to enforce the performance by a third person of a contract with the bankrupt. An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction.*" (Italics ours.) ". . . No instance can be found, I dare say, where the payment of a debt due or the specific performance of a contract with the bankrupt has been enforced in any such way."

And, similarly, in the *Matter of Borok*, 18 Am. B. R. (N. S.) 271, at 274, 50 Fed. (2d) 75:

"Where the trustee attempted to collect the accounts from the bankrupt's debtors he would have to resort to a plenary suit; he could not claim to be in 'possession of the property' for the existence of the property, i. e., a valid chose in action, is the issue in dispute."

And, as said by the Ninth Circuit Court of Appeals in *E. C. Street, as trustee, etc. v. Pacific Indemnity Company*, 22 Am. Br. (N. S.) 171, 61 Fed. (2d) 106:

“It, therefore, becomes necessary to determine the status of the money herein involved at that time, namely, October 8th, 1929. If, at the time of the filing of the petition in bankruptcy the appellee [Pacific Indemnity Company] had been in possession of the moneys which are now in its possession, there would be no question but that there would be no summary jurisdiction in the bankruptcy court in regard thereto. However, the possession of the moneys was not given to appellee until after the petition had been filed.”

In the case at bar, Mr. Fleishhacker's receiver makes no contention that he was ever in possession of any of the Rainier stock, which is the subject matter of the action, nor will he contend that he was ever in possession of any of the dividends paid on that stock. The sole basis for his assertion of the existence of the summary jurisdiction in the bankruptcy court is found in the contract between appellant and Mr. Fleishhacker, in which appellant agrees to do certain acts in relation to this stock and its dividends, but as we have seen in the *Matter of Ballou*, supra, the specific performance of a contract is not a proper subject matter of summary jurisdiction and as seen in the *Matter of Borok*, supra, although said by way of *dicta*, the collection of a debt due to Mr. Fleishhacker from Mr. Goldie is not properly the subject of summary jurisdiction.

POINT V OF APPELLEE'S ARGUMENT.

The fifth and final point made by appellee is to the effect that Mr. Goldie's asserted adverse claim to the stock and dividends is mere pretense, a sham and without color of merit. Without commenting upon the success of appellee's attorneys in shutting off, by objection at every turn, the efforts of appellant to disclose the nature of the adverse claim to the trial referee, it appears that insubstantiality is claimed by appellee for two reasons: (1) that more than a year antedating the bankruptcy proceeding appellant entered into a written contract with Mr. Fleishhacker; (2) that on September 20, 1938, more than a year antedating the bankruptcy proceeding, appellant paid to Mr. Fleishhacker one thousand eight hundred dollars (\$1800.00) as part of the dividends arising on the suit referred to in the contract.

From these two facts appellee argues that appellant's asserted adverse claim and his raising of the objection to the summary jurisdiction of the bankruptcy court was sham, mere pretense and without color of merit and that his asserted right to have a determination of his obligations in a plenary proceeding is unsound. But the cases hold that if the cause of action is the establishment of a debt due the bankrupt from a third person the summary jurisdiction does not lie,

Matter of Borok, supra;

Matter of Ballou, supra.

And that it is not proper to enforce by summary proceeding the performance of a contract by a third person,

Matter of Ballou, supra.

And where the uncontradicted testimony shows that the res is in the hands of persons other than the bankrupt summary jurisdiction does not lie.

Matter of Markel, 35 Am. B. R. 318, 228 Fed. 926.

And although the claim may ultimately prove false and fraudulent, still summary jurisdiction to determine this fact does not lie.

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 22 Sup. Ct. 269, 7 Am. B. R. 224.

CONCLUSION.

“The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself by that act not only all control of the bankrupt’s property and credits, but that no one can litigate with the assignee contested rights in another court, except in so far as the Circuit Courts have concurrent jurisdiction, and that all courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause,

and to dispose of their rights in a summary way. This court has steadily set its face against this view.

“The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

“The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.”

Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403.

We respectfully urge that the desire of the appellee for hasty and summary adjudication of the fundamental rights of strangers to the bankruptcy proceeding should gain no legal sanction or support by the affirmance of the case at bar for “the right to a choice of the forum in which one desires to litigate is a valuable right and may not be arbitrarily denied”.

Lewis v. Schrader, 287 Fed. 893.

The order of the District Court affirming the order of the referee which held that the rights of appellant were subject to a determination in a summary proceeding instituted on petition and order to show cause by the receiver, appellee herein, should be reversed.

Dated, San Francisco,
Septembre 25, 1940.

Respectfully submitted,

TORREGANO & STARK,

By CHARLES M. STARK,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit. *ef*

THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA,
Appellant,

vs.

ESTELLE CAMPBELL,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Northern Division

FILED
JUL 18 1940

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ORDER OF UNITED COMMERCIAL
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of Washington
for King County

No. 309875

ESTELLE CAMPBELL,

Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA, a corporation,
Defendant.

COMPLAINT

Comes now the plaintiff, Estelle Campbell, and respectfully complains and shows the Court as follows:

*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

That plaintiff is a citizen of the State of Washington residing in the City of Seattle, King County. That defendant is a corporation incorporated under the laws of the State of Ohio, and that during all times herein mentioned has been authorized to engage in and has been engaged in the business of writing and issuing contracts of accident insurance. That during all times herein mentioned, defendant has been authorized to do and has been doing business in the State of Washington, and at present is doing business in said State.

II.

That on the 3rd day of January, 1920, the defendant issued and delivered to Robert Henry Campbell, in the State of Washington, its Class A insurance certificate, No. 155949. That by amendment thereto, dated May 7, 1938, this plaintiff was named beneficiary therein. That all premiums, assessments and other sums due on the said certificate of insurance were paid or tendered and said certificate was in full force and effect at the date of death of said Robert Henry Campbell. That copies [2] of said certificate and amendment are in the possession of defendant herein and are made a part hereof by reference, as fully as though set forth at length herein.

III.

That among other provisions of said certificate of insurance, the defendant therein covenanted and

agreed to pay to said beneficiary the sum of sixty-three hundred dollars (\$6,300.00) upon due notice of the death of said Robert Henry Campbell; that such death resulted from bodily injury and that such bodily injury was effected solely through external, violent and accidental means.

IV.

That on the 12th day of July, 1938, the said Robert Henry Campbell came to his death from bodily injury effected solely through external, violent and accidental means, within the meaning and terms of said certificate of insurance, as a result of accidentally falling from a height into a stream where he was drowned.

V.

That plaintiff immediately furnished notice of said accidental death to the defendant but was unable to furnish full proof thereof, because on August 2, 1938 said defendant denied any and all liability under the said certificate of insurance and failed and neglected to forward to the plaintiff the forms and blanks necessary for making full proof of said accidental death.

VI.

That defendant owes to plaintiff the sum of sixty three hundred dollars (\$6,300.00) together with interest thereon from August 2, 1938. [3]

Wherefore, plaintiff demands judgment against defendant for the sum of sixty three hundred dol-

lars (\$6,300.00), together with interest thereon from August 2, 1938, until paid, and its costs and disbursements herein to be taxed.

WRIGHT, JONES & BRONSON,
Attorneys for Plaintiff.

State of Washington,
County of King—ss.

Estelle Campbell, being first duly sworn, on oath deposes and says: That she is the Plaintiff in the above and foregoing action; that she has read the above Complaint, knows the contents thereof, and believes the same to be true.

MRS. ESTELLE CAMPBELL.

Subscribed and sworn to before me this 15th day of October, 1938.

A. P. BOWES,
Notary Public in and for the State of Washington,
residing at Seattle.

Filed in County Clerk's Office, King County, Washington, Oct. 19, 1938. Carroll Carter, Clerk.
By B. H. Maffett, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [4]

[Title of Court and Cause.]

PETITION FOR REMOVAL

To the Superior Court of King County, Washington, and to the Honorable Judge of said Court:

The Petition of The Order of United Commercial Travelers of America, defendant herein, respectfully shows to the Court:

That the above entitled suit is brought by the plaintiff to recover of said defendant, the sum of Six Thousand Three Hundred Dollars, (\$6,300.), and is wholly of a civil nature, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000) Dollars, all of which will more fully appear by the Petition in said suit, which is hereby referred to and made a part thereof;

That the defendant, The Order of United Commercial Travelers of America, is a foreign corporation, and was at the time of the commencement of said suit, and still is, a non-resident of the State of Washington, and was then, and still is, a fraternal beneficiary association, a corporation duly formed, created and organized under and by virtue of the laws of the State of Ohio; and was then, and still is, a citizen and resident of the State of Ohio, and that Estelle Campbell, the plaintiff herein, was at the time of the commencement of said [5] suit, and still is, a citizen and resident of the State of Washington;

That the time within which said defendant is required by the laws of the State of Washington and the practice of this Court of Washington to answer or plead in said suit has not yet expired, and the defendant files herewith a bond in the sum of Five Hundred Dollars (\$500), with good and sufficient security for its entering in the United States District Court for the Western District, Northern Division of the State of Washington within thirty days (30) from the date of filing this Petition, a copy of the record in the suit, and for paying all costs that may be awarded by said United States District Court if it shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further avers that at or before the commencement of this suit, there was, and now is, a diversity of citizenship between the parties to said cause; that is, the plaintiff and defendant in this, that is, the plaintiff, Estelle Campbell, at or before the commencement of this suit was, and still is, a resident and citizen of the State of Washington, and the defendant, The Order of United Commercial Travelers of America, was, and still is, by virtue of its said incorporation, a citizen and inhabitant of the State of Ohio.

Wherefore, said defendant prays this Court to proceed no further herein, except to accept this Petition and said bond, and make an order requiring said defendant to enter and file a copy of the record herein in the United States District Court

for the Western District, Northern Division of the State of Washington, as provided by law.

[Seal] THE ORDER OF UNITED COM-
 MERCIAL TRAVELERS OF
 AMERICA,

A. W. FRANKLIN,

Supreme Secretary.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

Attorneys for Petitioner. [6]

State of Ohio,

County of Franklin—ss.

A. W. Franklin, being duly sworn, deposes and says that he is twenty-one (21) years of age and upwards, and is the Supreme Secretary of the defendant herein; that he has read or heard read the foregoing Petition and the contents thereof are true, except to those matters alleged upon information and belief, and as to those matters he believes them to be true.

A. W. FRANKLIN.

Sworn to and subscribed before me this 28th day of October, 1938.

LLOYD WEEKS,

Notary Public, Franklin Co., O. My Commission expires Aug. 24, 1940.

Copy recv'd Nov. 9, 1938. Jones & Bronson, Atty. for plttf. R.V.H. Filed in County Clerk's Office,

King County, Washington, Nov. 9, 1938. Carroll Carter, Clerk. By Ralph C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [7]

[Title of Court and Cause.]

ORDER FOR REMOVAL OF THIS SUIT FROM
THIS COURT TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT, NORTHERN DIVISION OF
THE STATE OF WASHINGTON.

The defendant herein, having within the time provided by law, filed its Petition for removal of this cause to the United States District Court for the Western District, Northern Division of the State of Washington, and having at the same time offered its Bond in the sum of Five Hundred (\$500) Dollars, with the National Surety Corporation, good and sufficient surety, pursuant to statute and conditioned according to law;

Now, therefore, this Court does hereby accept and approve said Petition and does hereby order that this cause be removed for trial to the United States District Court for the Western District, Northern Division of the State of Washington; pursuant to the statute of the United States, and that all other proceedings of this Court be stayed.

Done in open court this 15th day of November, 1938.

JAMES B. KINNE,
Judge.

O. K. as to form:

~~WRIGHT, JONES & BRONSON~~
Attorney for Plaintiff.

Presented by:

WILLARD E. SKEEL,
Attorney for Defendant.

Copy rec'd Nov. 9, 1938. Jones & Bronson, Attorney for Pltff. R.V.H. Filed in County Clerk's Office, King County, Washington, Nov. 9, 1938. Carroll Carter, Clerk. By B. H. Maffett, Deputy.

Filed in County Clerk's Office, King County, Washington, Nov. 15, 1938. Carroll Carter, Clerk. By Ralph C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [8]

[Title of Court and Cause.]

BOND

Know all men by these presents that we, The Order of United Commercial Travelers of America, a corporation of the State of Ohio, having its principal office in the City of Columbus, as Principal, and the National Surety Corporation, as Surety,

are holden, and stand firmly bound unto Estelle Campbell, in the penal sum of Five Hundred Dollars (\$500), for the payment whereof, well and truly to be made unto Estelle Campbell, her heirs, representatives and assigns, we bind ourselves, representatives and assigns jointly and firmly by these presents.

Upon condition, nevertheless, that whereas, the said The Order of United Commercial Travelers of America has filed its Petition in the Superior Court of King County, State of Washington, for the removal of a certain cause therein pending, wherein Estelle Campbell is plaintiff and the said The Order of United Commercial Travelers of America is defendant, to the United States District Court for the Western District, Northern Division of the State of Washington.

Now, if the said The Order of United Commercial Travelers of America shall enter in said United States District Court for the Western District, Northern Division of the State of Washington, within thirty (30) days from the date of filing said Petition for removal, a certified copy of the record in said suit [9] and shall well and truly pay all costs that may be awarded by the said United States District Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and effect.

In Witness whereof, The Order of United Commercial Travelers of America has hereunto set its

hand and seal this 28th day of October, 1938, and the National Surety Corporation has hereunto set its hand and seal this 9th day of November, 1938.

[Seal] THE ORDER OF UNITED COM-
 MERCIAL TRAVELERS OF
 AMERICA,

By A. W. FRANKLIN,

Supreme Secretary.

[Seal] THE NATIONAL SURETY
 CORPORATION,

By J. H. LOBDELL,

Atty. in Fact. [10]

State of Ohio,
County of Franklin—ss.

A. W. Franklin, being duly sworn, deposes and says that he is the Supreme Secretary of the said The Order of United Commercial Travelers of America, the corporation which executed the foregoing instrument and acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that he did sign and seal said instrument on behalf of said corporation; and as and for its corporate deed and by authority of its Board of Directors, and that the same is his free act and deed as such Secretary, and is the free act and deed of said corporation for the uses and purposes in said instrument set forth.

In testimony whereof, I have hereunto set my hand and affixed the official seal at Columbus, Ohio, this 28th day of October, 1938.

A. W. FRANKLIN.

Sworn to and subscribed before me this 28th day of October, 1938.

[Seal] LLOYD WEEKS,
Notary Public, Franklin Co., O. My Commission
expires Aug. 24, 1940.

Copy recv'd Nov. 9, 1938. Jones & Bronson,
Atty. for pltff. R.V.H. Filed in County Clerk's
Office, King County, Washington, Nov. 9, 1938.
Carroll Carter, Clerk. By Ralph C. Parkhurst,
Deputy.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Dec. 8, 1938. Elmer Dover, Clerk. By
Elmo Bell, Deputy. [11]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 20

ESTELLE CAMPBELL,

Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA, a corporation,
Defendant.

AMENDED ANSWER

Comes now the defendant and for its amended
answer admits, denies and alleges as follows:

I.

Answering paragraph 1. of the plaintiff's complaint the defendant admits the same.

II.

Answering paragraph 2. of the plaintiff's complaint the defendant admits that it issued and delivered to Robert Henry Campbell an insurance certificate dated January 3, 1920, being certificate number 155949, and denies each and every other allegation therein contained.

III.

Answering paragraph 3. of the plaintiff's complaint the defendant denies each and every allegation therein contained.

IV.

Answering paragraph 4. of the plaintiff's complaint the defendant denies each and every allegation therein contained.

V.

Answering paragraph 5. of the plaintiff's complaint the defendant admits that it denied any liability under said contract of insurance and except for that portion of said paragraph [12] specifically admitted, denies each and every other allegation therein contained.

VI.

This defendant in answer to paragraph 6. of the plaintiff's complaint denies that it is indebted to

the plaintiff in the sum of \$6300. or any sum whatsoever.

By way of further answer and for its first affirmative defense the defendant alleges as follows:

I.

That as a part of said certificate or contract of insurance therein it is provided that:

“This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.”

II.

That the contract and By-Laws as effective September 1, 1937, and of full force and effect at the time of the alleged accidental death of the deceased, Robert H. Campbell, provided in Article IV., Section 1, page 30, line 19 to 29 inclusive, that:

“An annual assessment in the amount of \$16. shall be charged against all insured members on December 2nd of each year. Special assessments not exceeding \$4. may be levied by the

Supreme Executive Committee as often as the needs of the Order require. The annual assessment may be paid annually, semi-annually or quarterly, but in any event, payments of not less than Four (\$4.00) Dollars are due and must be paid on or before December 31, March 31, June 30 and September 30 of each year.”

That said Constitution and By-Laws further provided in Article [13] II, Section 8, page 11, line 40:

“Any member who fails to pay fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and he, his beneficiaries or anyone claiming under his Membership or Certificate of Insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his Certificate of Membership or

Insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.”

III.

That said contract or certificate of insurance herein referred to also provided that:

“If any insured member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a member or as an Insured Member of this Order when and as the same becomes severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance at the time such default occurs and by virtue thereof shall be suspended from any and all rights to indemnity or benefits of whatever character under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

“The sending of notices of any assessments, fees, fines, costs or dues, or making demand for the same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default.” [14]

IV.

That on June 30, 1938 assessment number 233 was due and payable. That neither on that date nor any date subsequent thereto was said assessment ever paid and that by reason of said default in the failure to pay assessment number 233 said certificate of insurance was null and void and of no effect whatever at the time of the death of Robert Henry Campbell.

For a further answer and by way of a second affirmative defense the defendant alleges:

I.

That said defendant herewith adopts by reference as fully as if set out herein the allegations contained in paragraph I. of its first affirmative defense of this answer.

II.

That the Constitution and By-Laws effective September 1, 1937, and which were in full force and effect at the time of the alleged accidental death of the deceased, Robert H. Campbell, provided in Article IV., Section 4, page 33, for the

payment of the sum of \$5,000. in event of an accidental death.

Wherefore having fully answered plaintiff's complaint the defendant prays:

1. For a judgment of dismissal upon the general issue and upon the first affirmative defense alleged, and

2. Should the foregoing prayer for any reason be denied, then in any event that the plaintiff be limited to recovery of \$5,000. against said defendant, and

3. That the defendant recover its costs of suit.

W. R. McKELVY,

Of Attorneys for Defendant. [15]

State of Washington,
County of King—ss.

W. R. McKelvy, being first duly sworn, on oath, deposes and says:

That he is one of the attorneys for the defendant in the foregoing cause of action; that he has read the foregoing amended answer, knows the contents thereof, and believes the same to be true.

W. R. McKELVY.

Subscribed and sworn to before me this 28th day of January, 1939.

MARTHA C. ANDERSON,

Notary Public in and for the State of Washington,
residing at Seattle.

Copy Rec'd Feb. 1, 1939. Jones & Bronson, Attorney for.....J.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 2, 1939. Elmer Dover, Clerk. By Elmo Bell, Deputy. [16]

[Title of District Court and Cause.]

AMENDED REPLY

Comes now plaintiff and for her amended reply to the amended answer of defendant herein admits, denies and alleges as follows:

I.

Replying to Paragraph I of defendant's first affirmative defense of its amended answer, plaintiff admits the same.

II.

Replying to Paragraphs II and III of defendant's first affirmative defense, plaintiff denies that the provisions of the contract, constitution and by-laws of the defendant therein set forth were in full force and effect at the time of the accidental death of the deceased, Robert H. Campbell.

III.

Replying to Paragraph IV of defendant's first affirmative defense, plaintiff denies each and every allegation therein set forth.

IV.

Replying to Paragraph I of defendant's second affirmative defense in its amended answer, plaintiff admits the same.

V.

Replying to Paragraph II of defendant's second [17] affirmative defense in its amended answer, plaintiff denies each and every allegation therein contained.

First Affirmative Reply

By way of its first affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows:

1.

That Assessment Number 233, dated June 30, 1938, was paid by the decedent, Robert H. Campbell, prior to his death, by virtue of a credit in his favor appearing on the books of defendant.

Second Affirmative Reply

By way of its second affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows:

I.

That, in the event the court should find that Assessment Number 233 was unpaid at decedent's death, defendant is estopped to rely upon the said nonpayment by reason of the fact that it and its agents have for years past collected assessments and received payment thereof from decedent, Robert H. Campbell, after the same were said to be due and payable, and, in some cases, more than thirty days after said date, without objection and without penalizing said decedent, whereby decedent

was lulled into belief that said payments fully protected him under the policy.

Third Affirmative Reply

By way of its third affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows: [18]

I.

That by reason of defendant's course of conduct heretofore set out at length in the Second Affirmative Reply, defendant has waived the provisions of its constitutions and by-laws which are quoted in Paragraph II of the first affirmative defense in its amended answer.

Wherefore, having fully replied to the first and second affirmative defenses of the amended answer filed herein by the defendant, plaintiff prays for judgment against the defendant in the sum of Six Thousand Three Hundred (\$6,300.00) Dollars, together with interest and costs of suit.

WHEELER GREY,
Of Attorneys for Plaintiff.

We consent to the filing of the foregoing amended reply.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Sept. 22, 1939. Elmer Dover, Clerk. By R. B. Allen, Deputy. [19]

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL.

To the Clerk of the Above Entitled Court: and
To Messrs. Skeel, McKelvy, Henke, Evenson & Uhlmann, Attorneys for Defendant:

Notice is hereby given that the plaintiff in the above entitled cause, Estelle Campbell, elects to have this cause tried by jury and herewith makes demand for the same.

WHEELER GREY,

Of Attorneys for Plaintiff.

Received Feb. 8, 1939. Skeel, McKelvy, Henke, Evenson and Uhlmann, Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 9, 1939. Elmer Dover, Deputy Clerk.

[20]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION
UNDER RULE 36

Plaintiff, Estelle Campbell, requests defendant, The Order of United Commercial Travelers of America, a corporation, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following described documents, the originals of which are in the possession of the defendant, are genuine:

(a) Book of Account Sheet headed “Campbell, Robt. H., Certificate No. 155949”, at the top of which appears the seal of the Supreme Council of Defendant; the same setting forth in detail the items charged and credited to “Dues Account” and “Assessment Account” from January 1, 1920, to December, 1937, assessment number 231.

(b) Book of Account Sheet similar to that described in (a), showing dues and accounts entries on April 26, 1938 and the statements “Drowned 7/12—” and “Deceased—Date 7/12 Cause Drowning While Fishing.”

2. That each of the following statements is true:

(a) Estelle Campbell, wife of the late Robert H. [21] Campbell, insured under Certificate No. 155,949, is the duly accredited beneficiary under said certificate, as appears by a rider dated May 7, 1938, and attached thereto.

(b) Robert Henry Campbell, insured under Certificate No. 155,949, came to his death from bodily injury effected solely through external, violent and accidental means, viz., by drowning, within the meaning and terms of said certificate.

(c) On August 2, 1938, after plaintiff had notified it of Robert Henry Campbell's death

by drowning on July 12, 1938, defendant denied liability under Certificate No. 155,949 and failed and neglected to furnish and has never furnished to plaintiff blanks for proof of said accidental death as required under its constitution and by-laws.

JONES & BRONSON

WHEELER GREY,

Attorneys for Plaintiff,
610 Colman Building,
Seattle, Washington.

Received Jan. 12, 1940. Skeel, McKelvy, Henke, Evenson and Uhlmann. Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 12, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [22]

[Title of District Court and Cause.]

STIPULATION ON TRIAL

It is stipulated by and between Estelle Campbell, plaintiff in the above-entitled cause, and The Order of United Commercial Travelers of America, a corporation, defendant, acting through their respective attorneys, that, for the purposes of the trial of the said cause, and for no other purpose, the following facts are true, i. e.:

The above-entitled court has jurisdiction of the parties and the cause. Defendant was and is a fraternal beneficiary association.

On January 3, 1920, defendant issued and delivered to Robert Henry Campbell, in the State of Washington, a Class A insurance certificate, No. 155949, being the one upon which this action is based. By amendment thereto, it was provided that \$5,000, rather than \$6,300, was the benefit payable to the beneficiary upon due proof of the death of Robert Henry Campbell resulting from bodily injury effected solely through external, violent and accidental means. By amendment thereto, dated May 7, 1938, plaintiff was named beneficiary.

On July 12, 1938, Robert Henry Campbell came to his death from bodily injury effected solely through external, violent and accidental means, within the meaning and terms of [23] Certificate No. 155949. Defendant was duly notified thereof, and, on August 2, 1938, denied liability under the certificate. Defendant has not furnished to plaintiff or to anyone on her behalf blanks to be filled out and submitted as proofs of claim under the certificate.

Dated this 16th day of January, 1940.

JONES & BRONSON,
WHEELER GREY,

Attorneys for Plaintiff.

W. R. McKELVY &
FREDERICK V. BETTS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 17, 1940. Millard P. Thomas, Clerk. By S. Cook, Deputy. [24]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find for the plaintiff and fix the amount of her recovery in the sum of Five Thousand Dollars (\$5000.).

ANTON J. MARX,

Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 19, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [25]
Jr. 27, Page 305.

In the United States District Court for the
Western District of Washington,
Northern Division

No. 20

ESTELLE CAMPBELL,

Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA,

Defendant.

JUDGMENT

This matter having come regularly on for trial before the undersigned, sitting as one of the Judges of the above entitled court before a jury, on the 17th day of January, 1940, in his court room in the

Post Office Building, Seattle, King County, Washington, plaintiff being present in person, defendant being represented by the Secretary of its Local Council, and counsel for both parties being in attendance, and a jury having been empaneled, examined and sworn, and witnesses having been called, sworn and examined, counsel having been heard, and the cause having been submitted to a jury, and the said jury having returned into open court its unanimous verdict in favor of the plaintiff, and awarding damages to the plaintiff in the sum of \$5,000., the admitted face value of the certificate of insurance which formed the basis of suit, and the court being fully advised in the premises, now, therefore, it is hereby

Ordered, adjudged and decreed that judgment on the said verdict be hereby entered in favor of the plaintiff, Estelle Campbell, in the sum of Five Thousand Dollars (\$5,000.), with interest thereon at 6% from the 2nd day of November, 1938, being in the further sum of \$364.10; and it is further [26]

Ordered, adjudged and decreed that plaintiff be given judgment against defendant for her costs and disbursements herein to be taxed.

Done in open court this 26th day of January, 1940.

CHARLES C. CAVANAH,
United States District Judge.

Presented by:

WHEELER GREY,

One of attorneys for Plaintiff

Copy received January 24, 1940.

.....,
One of the Attorneys for Defendant.

Received Jan. 23, 1940. Skeel, McKelvy, Henke, Evenson & Uhlmann. Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. COB No. 3.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Jan. 29, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [27]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now the defendant, The Order of United Commercial Travelers of America, and moves the court herein to render and enter judgment in favor of the defendant herein, dismissing the above entitled action with prejudice, in accordance with this defendant's motion for a directed verdict, made at the time of the trial, notwithstanding the verdict of the jury herein.

Dated this 22nd day of January, 1940.

W. R. McKELVY and
F. V. BETTS,

Attorneys for Defendant.

Copy received January 23, 1940. Wheeler Grey, one of Attys. for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 23, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [28]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant The Order of United Commercial Travelers of America, and without waiving its challenge to the legal sufficiency of the evidence; without waiving its motion for a directed verdict made during the trial of the above entitled cause, and without waiving its motion for judgment notwithstanding the verdict but expressly relying thereon, this defendant herein does hereby move that it be granted a new trial in the above entitled cause for the following reasons materially affecting the substantial rights of this defendant:

1. Irregularity in the proceedings of the court and adverse party by which this defendant was prevented from having a fair trial;
2. Substantial errors and rulings on evidence at the trial;
3. Substantial errors in giving the court's instructions;

4. Substantial errors of the court in refusing to give certain of the defendant's requested instructions to the jury;

5. That the verdict of the jury was and is contrary to law;

6. That said verdict is contrary to the evidence in the case; [29]

7. Misconduct of counsel, court and jury;

8. That the verdict appears to have been given under the influence of passion or prejudice;

9. Newly discovered evidence, surprise and newly discovered law;

10. Accident or surprise which ordinary prudence could not have guarded against;

11. Insufficiency of the evidence to justify the verdict, or that it is against the law;

12. Error in law occurring at the trial and excepted to at the time by the party making this application;

Dated, this 22nd day of January, 1940.

W. R. McKELVY and

F. V. BETTS,

Attorneys for Defendant.

Copy received January 23, 1940. Wheeler Grey, one of Attys. for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 23, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [30]

[Title of District Court and Cause.]

ORDER

The motion of the defendant for Judgment notwithstanding the verdict and the motion of the defendant for a new trial in the above entitled case having been submitted upon briefs in compliance with stipulation of counsel and after consideration of the same it is

Ordered:

1. That the motion of the defendant for Judgment notwithstanding the verdict is denied.

2. That the motion of the defendant for new trial is denied.

Exception allowed the defendant.

Dated March 18, 1940.

CHARLES CAVANAH,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 20, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. COB No. 3, Page 106. [31]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that The Order of United Commercial Travelers of America, defendant above named, hereby appeals to the Circuit Court of Ap-

peals for the Ninth Circuit from the judgment entered on the verdict by the Clerk of the above entitled court on January 19, 1940, from the judgment signed January 26, 1940, by one of the judges of the above entitled court and filed in the clerk's office on January 29, 1940, and from the order entered March 20, 1940, denying the defendant's motion for new trial and denying the defendant's motion for judgment notwithstanding the verdict of the jury, all entered in this action.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
By FREDERICK V. BETTS,
Attorneys for Appellant, The
Order of United Commercial
Travelers of America.
914 Insurance Building,
Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 16, 1940. Millard P. Thomas, Clerk. By S. Cook, Deputy. [32]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL

Know all men by these presents that we, The Order of United Commercial Travelers of America, prin-

cipal, and National Surety Corporation, as surety, acknowledge ourselves to be jointly indebted to Estelle Campbell, appellee in the above cause, in the sum of Five Thousand Three Hundred Sixty-four and 10/100 Dollars (\$5364.10), conditioned that,

Whereas on the 29th day of January, 1940, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in that court wherein Estelle Campbell was plaintiff and The Order of United Commercial Travelers of America was defendant, numbered on the Civil Docket as No. 20, a formal judgment signed by one of the judges of the above entitled court was filed against the said defendant and the said defendant having filed in the office of the clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of Seattle in the State of Washington on the 9th day of September, 1940, next;

Now, the condition of the above obligation is such that if the said Order of United Commercial Travelers of America shall prosecute its appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and dam- [33] ages as the appellate court may adjudge

and award, then the above obligation is void, else to remain in full force and effect.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

By SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By W. R. McKELVY

Its Attorneys

Principal

[Seal] NATIONAL SURETY COMPANY

By J. H. LOBDELL

Attorney in Fact

Surety

Approved this 20th day of April, 1940.

CHARLES C. CAVANAH

Apr. 17, 1940

Judge

Approved as to form and no reason appearing to the contrary as to surety.

JONES & BRONSON

By WHEELER GREY

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 22, 1940. Millard P. Thomas, Clerk. S. Cook, Deputy. Bound Vol. 4, page 105. [34]

[Title of District Court and Cause.]

ORDER DIRECTING THE FORWARDING OF
ORIGINAL PAPERS AND EXHIBITS TO
THE CLERK OF THE CIRCUIT COURT
OF APPEALS, FOR THE NINTH
CIRCUIT.

This matter having come on before the undersigned Judge of the above entitled court upon the defendant's motion for an order directing the clerk of said court to forward the original papers and exhibits admitted in the trial of this cause to the clerk of the Circuit Court of Appeals, for the Ninth Circuit upon the appeal of said cause to said court, and the court having considered the defendant's motion and believing it to be proper, Now, Therefore,

It Is Hereby Ordered and Directed, that the clerk of the above entitled court shall forward to the clerk of the Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal of the above entitled cause, all the original papers and exhibits which were admitted in the trial of said cause in this court.

Done this 20th day of April, 1940.

CHARLES C. CAVANAH

Judge

O. K. as to form:

~~WHEELER GREY~~

Attorney for plaintiff

Presented by :

W. R. McKELVY &

FREDERICK V. BETTS

Attorney for defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 22, 1940. Millard P. Thomas, Clerk. By S. Cook, deputy. COB No 3 Page 236 [35]

[Title of District Court and Cause.]

STIPULATION FOR THE EXTENSION OF
TIME FOR FILING AND DOCKETING
RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record,

Whereas it is impossible to settle, certify, file and docket the record on appeal in the above entitled action within the forty (40) days' time provided in the Rules of the District Court of the United States, rule No. 73G, and pursuant to the provisions of said rule, it is hereby

Agreed that the time within which said record on appeal may be filed and docketed with the Appellate Court may be extended up to and including June 25, 1940.

It is further agreed that the appellant will serve and file its briefs on or before July 31, 1940, and

that the appellee will serve and file her briefs on or before August 30, 1940.

Dated at Seattle, Washington, May 8th, 1940.

JONES & BRONSON &
WHEELER GREY

Attorneys for Plaintiff

W. R. McKELVY &

FREDERICK V. BETTS

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division May 13 1940 Millard P. Thomas, Clerk By R. Elias Deputy [36]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

This matter having come on regularly for hearing before the undersigned Judge of the above entitled Court, pursuant to a written stipulation of the parties hereto, and good cause having been shown therefor, it is hereby

Ordered that the time for filing and docketing the defendant's record on appeal in the above entitled cause be and the same is hereby enlarged and extended to and including June 25, 1940, all pursuant to the provisions of rule No. 73G of the Rules of the District Court of the United States.

Done in open Court, this 10th day of May, 1940.

CHARLES C. CAVANAH

Judge.

Presented By:

FREDERICK V. BETTS

Of Counsel for Defendant

Approved as to Form:

JONES & BRONSON

WHEELER GREY

[Endorsed]: Filed in the United States District Court Western District of Washington, Northern Division May 13 1940 Millard P. Thomas, Clerk By R. Elias Deputy [37]

[Title of District Court and Cause.]

STIPULATION REGARDING PRINTING
TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record, that there need not be printed in the printed record to be forwarded to the Circuit Court of Appeals the formal caption of the papers in said transcript save to set forth the designation or character of the paper or instrument to be printed and that there may be omitted at the end of such paper, printing or order the formal certificate of filing other than the file marks and date of filing and signature of the clerk.

Dated at Seattle, Washington, this 14 day of May, 1940.

W. R. McKELVY &
FREDERICK V. BETTS
Attorneys for Defendant.
JONES & BRONSON
WHEELER GREY
Attorneys for Plaintiff

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division May 14, 1940 Millard P. Thomas, Clerk By R. Elias Deputy [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now the defendant, The Order of United Commercial Travelers of America, and files this statement of points on which it intends to rely on its appeal from a certain final judgment of this court in the above entitled cause, to-wit:

1. That as a matter of law the court erred in failing to direct a verdict for the defendant at the close of all evidence where the evidence affirmatively shows that the deceased was doing those things which he had a contractual right to do, and where there was no showing that the defendant at any time had waived its rights under the policy upon which this suit is predicated;

2. That as a matter of law the plaintiff failed to prove by the evidence any of the elements of the doctrine of waiver and estoppel and failed to establish a jury question relative to that subject;

3. All of the court's instructions to the jury on the question of estoppel and waiver are erroneous in this case, where the deceased had an affirmative contractual right and was exercising that right and where there was no showing that the defendant did any more or any less than was provided for under the terms of the insurance contract herein.

W. R. McKELVY &

FREDERICK V. BETTS

Attorneys for Defendant.

June 1, 1940

Received Copy

JONES & BRONSON

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division June 12 1940 Millard P. Thomas, Clerk
By R. Elias Deputy [39]

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBITS

PLAINTIFF'S EXHIBIT "1", adm. Jan. 17,
1940, Extracts from Insurance Certificate dated
January 3, 1920, Certificate No. 155949.

"Incorporated Under the General
Laws of the State of Ohio.

Class A
Insurance Certificate
The Order of
United Commercial Travelers
of America
Columbus, Ohio,

An Association incorporated under the laws of the state of Ohio, hereby certifies that Robert Henry Campbell, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together

with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and [40] the seal of the Supreme Council, at Columbus, Ohio, this 3 day of Jan. A. D. 1920

[Seal]

R. A. TATE

Supreme Counselor.

WALTER D. MURPHY

Supreme Secretary.”

(Page 1)

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“Delinquency.

If any Insured Member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a Member or as an Insured Member of this Order when and as the same becomes severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance at

the time such default occurs and by virtue thereof shall be suspended from any and all rights to indemnity or benefits of whatever character under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

The sending of notices of any assessments, fees, fines, costs or dues, or making demand for the same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default.”

“Cancellations.

If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void from and after such suspension without the necessity of any formal record of cancellation.

If any Insured Member shall withdraw from membership in the Order his Certificate or Insurance shall be deemed cancelled, null and void from and after the date of written notice of such with-

drawal without the necessity of any formal record of cancellation.

If any insured Member shall become delinquent and cease to be in good standing as an Insured Member, his Certificate of Insurance may be cancelled by the proper officers of his Subordinate Council.” [41]

PLAINTIFF’S EXHIBIT “2”, Adm. Jan. 17, 1940, Certificate of Membership dated January 3, 1920.

“Incorporated Under the General
Laws of the State of Ohio.

The Order of
United Commercial Travelers
of America.

Columbus, Ohio,

An Association incorporated under the laws of the State of Ohio, hereby certifies that Robert Henry Campbell is a member of said The Order of United Commercial Travelers of America, being a member of Seattle Council No. 83, at Seattle, Wash. and is entitled to all the fraternal rights and privileges provided by the Constitution, By-Laws and Articles of Incorporation of said Order as they now are or may hereafter be duly changed, added to or amended, He is hereby recommended to the fraternal courtesy of the Brotherhood.

In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council this 3rd day of Jan. 1920, done at Columbus, Ohio.

[Seal]

R. A. TATE

Supreme Counselor.

WALTER D. MURPHY

Supreme Secretary.

Number

155949''

PLAINTIFF'S EXHIBIT "3", Adm. Jan. 17, 1940, Extracts from the Constitution and By-Laws of the defendant corporation, effective September 1, 1919.

Art. IV, Sec. 7; p. 56:

"Suspensions"

"Sec. 7. Any member who fails to pay the fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately on the happening of such default and by virtue thereof become a delinquent member, and he and every person or persons claiming under him and by virtue of his membership and his certificate of insurance shall likewise, at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character; while he thus continues a delinquent member the sending to him of notice

of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.

“Any member who shall have failed to pay all fees, fines, costs, dues or assessments charged or levied against him when and as the same become due and payable, and who has not restored himself to good standing at or before the time fixed for the next regular meeting of his Subordinate Council after the same shall become due and payable, by paying all such sums due, shall, at such meeting of his Subordinate Council, be suspended from the Order by the Senior Counselor, or, in his absence, by the presiding officer.

“Should any Subordinate Council, however, for any reason, fail at any time to hold its regular meeting, and should there be any member or members thereof at that time who are in default for the payment of any fees, fines, costs, dues or assessment, the Secretary-Treasurer of such Council shall, on the date of such meeting, enter on his

books the suspension of all such members so in default, and such suspension shall become and be operative from and as of such date, and such Secretary-Treasurer shall report to the Supreme Secretary and to his Subordinate Council, at the next regular meeting held by it, the name of the member or members so suspended and the date of such suspension.

“The failure to suspend a delinquent member under the provisions of this section shall not constitute or be a waiver of the forfeiture provided for in this section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor.”

Art. IV, Sec. 8, p. 57:

“Reinstatements

“Sec. 8. Any member suspended under the provisions of the foregoing section, desiring reinstatement, shall make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended, and shall accompany such application with a sum equal to the dues for the current period in which he applies for reinstatement, and also one assessment. On the receipt of such application and payment, the Secretary-Treasurer of his Council shall present such request at the next regular meeting of his Council. Each application shall be referred to a

committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership.”

Art. VII, Sec. 2, p. 82, line 13 to p. 83, line 10 and lines 20 to 27:

“Calls and Assessments

Sec. 2. Whenever the Death Fund in the possession of the Supreme Treasurer shall be less than fifteen thousand (\$15,000.00) dollars, or the Disability Fund in the possession of the Supreme Treasurer be less than thirty thousand (\$30,000.00) dollars, or the General Expense Fund in the possession of the Supreme Treasurer be less than twenty-five cents (25¢) for each Insured Member in good standing, the Supreme Counselor shall order a call to be made by the Supreme Secretary upon each Subordinate Council for the Assessment Fund in its possession belonging to the Order to the amount of two (\$2.00) dollars for each Insured Member in good standing in such Subordinate Council, which amount shall be paid to the Supreme Secretary within fifteen (15) days from the date of said call; provided, however, that no newly initiated member shall be included in any call made within the two calendar months succeeding that within which he was insured. [42]

At the time the Supreme Counselor orders a call to be made as hereinbefore provided he shall also order the Supreme Secretary to levy, within fifteen (15) days from the date of said call, an assessment of two (\$2.00) dollars on each Insured Member in good standing in the order as shown on the books of the Supreme Secretary, which assessment shall be paid to the Secretary-Treasurer of the Subordinate Council to which the Insured Member belongs within thirty (30) days from the date the same is levied, and shall be placed to the credit of the Assessment Fund of the Order in the possession of such Subordinate Council. No newly initiated member, however, shall be assessed for any purpose named in this Section within the two calendar months succeeding that within which he was insured.

* * * The mailing of any notice of any assessment to a member of the Order who is not insured or is suspended or is not in good standing, or to anyone whose membership or insurance has been cancelled

or who has been expelled from the Order shall not be held to waive any lapse or forfeiture of rights which may have occurred, from any cause.

Art. VIII, Sec. 3, p. 84, line 14:

“Delinquency.

Sec. 3. If any Insured Member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a member or as an Insured Member of this Order when and as the same become severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance, at the time such default occurs, and by virtue thereof, shall be suspended from any and all rights to indemnity or benefits of whatever character, under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

The sending of notices of any assessment, fees, fines, costs, or dues, or making demand for the

same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default.”

“Cancellations.

Sec. 4. If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void, from and after such suspension without the necessity of any formal record of cancellation. * * *

If any Insured Member shall become delinquent and cease to be in good standing as an Insured Member, his Certificate of Insurance may be cancelled by the proper officers of his Subordinate Council.”

[43]

Art. VII, Sec. 5, p. 85:

“Insurance.

Sec. 5. The Order shall indemnify its Insured Members in accordance with the terms of this Article for disability or death resulting from accidental means under two classes, namely: (A) and (B).

The Supreme Executive Committee shall prepare blanks for application for insurance and Certificates of Insurance for each of said Classes, and may modify, revise and change the same from time to time. Any Certificate of Insurance may have printed thereon, or attached thereto, the provisions of the Constitution relating to insurance, of the Class em-

brased in such certificate and a copy of the Application of the member insured.”

Art. VII, Sec. 8, p. 86:

“Issuance of Certificates.

Sec. 8. Each application for insurance shall be submitted to the Supreme Executive Committee and if said applicant is entitled to an insurance certificate under either of the classes set out in this Article, the Supreme Counselor and the Supreme Secretary shall sign and issue to said applicant a Certificate of Insurance of the form or Class to which he is entitled, and said Certificate of Insurance shall be forwarded to said applicant, by the Supreme Secretary.

Art. VII, Sec. 9, p. 86, line 26 to line 33:

“Insured Members. Class A.

Sec. 9. Any member of this Order who is in good standing and who has not lost either hand, either foot, or the sight of either eye, and is not deaf, subject to fits, or mentally infirm, and who has no wound, injury or disease which will render him especially liable to accident or which would be aggravated or retarded by an accident, may be entitled to insurance under Class A.

Art. VII, Sec. 10, p. 90, line 4 to line 10:

“Insured Members. Class B.

(Physical Disability.)

Sec. 10. Any member of this Order who is in good standing and who may have lost one hand or

one foot, or the sight of one eye, and who is not deaf or subject to fits, nor mentally, or physically infirm, and who has no other impairment which will render him especially liable to an accident may be entitled to insurance under Class B.

Art. VII., Sec. 11, p. 92, line 21:

“Reinsurance.

Sec. 11. Any member whose Certificate of Insurance shall become cancelled, as provided in Section 4 of this Article, desiring insurance shall make application therefor to his Council, on a blank prepared by the Supreme Executive Committee, and shall [44] accompany such application with two (\$2.00) dollars, which shall be placed to his credit in the Assessment Fund.

The application shall be forwarded by the Secretary-Treasurer, within ten days, to the Supreme Secretary.

The Supreme Executive Committee may cause such applicant to be examined by his Council Surgeon or the Supreme Surgeon, or by some competent person selected for that purpose by the Supreme Surgeon. The report of such examination shall be submitted in full to the Supreme Executive Committee, and if such applicant be found to be a desirable risk, and to be in good standing as a member of the Order, the Supreme Executive Committee may insure such member, and shall notify such member and the Secretary-Treasurer of his Subor-

dinate Council of such reinsurance and the Class under which such reinsurance is issued.”

Art. IV, Sec. 22, p. 68, line 4:

“Meetings and Quorum.

Sec. 22. All Subordinate Councils shall hold regular meetings at least once each month, upon a stated date fixed by the Council.” [45]

PLAINTIFF'S EXHIBITS "4" AND "5"

Admiralty, Jan. 17, 1940—Extracts showing payments, dues and assessments, effective January 1920
to July 12, 1938

Geo. B. Dunn Box 235 Ra 5604

Name Campbell Robt H.

Certificate No. 155949

DUES ACCOUNT

ASSESSMENT ACCOUNT

Cr.				Cr.				Cr.				Cr.			
Quarter Beginning	Year	When Paid	Am't	Quarter Beginning	Year	When Paid	Am't	No.	When Called	When Paid	Am't	No.	When Called	When Paid	Am't
Jan'y 1st)	1920	Dec 20	1	Jan'y 1st)	1930	Feb 1	1	154		Dec. 20	2	195	Jan 1	Feb 13	3
April 1st)	"	Apr 5	1	April 1st)	"	"	1	155	Apr 15	Apr. 5	2	196	Apr 1	Apr 13	3
July 1st)	"	May 5	1	July 1st)	"	"	1	156	June 15	May 5	2	197	July 1	July 8	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	157	Aug 15	"	2	198	Oct. 1	Nov. 5	3
Jan'y 1st)	1921	Feb 1	1	Jan'y 1st)	1931	Mar 12	1	158	Oct 15	"	2	199	Jan 1	Feb 1	3
April 1st)	"	"	1	April 1st)	"	6/11	1	159	Dec 15	Aug 26	2	200	Apr 1	"	3
July 1st)	"	"	1	July 1st)	"	"	1	160	Feb 15	Feb 1	2	201	July 1	"	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	161	Apr 15	"	2	202	Oct 1	"	3
Jan'y 1st)	1922	Jan. 14	1	Jan'y 1st)	1932	2/24	1	162	June 15	"	2	203	Jan 1	Mar 12	3
April 1st)	"	"	1	April 1st)	"	"	1	163	Aug 15	"	2	204	Apr 1	6/11	3
July 1st)	"	"	1	July 1st)	"	"	1	164	Oct 15	"	2	205	July 1	"	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	165	Dec 15	Jan 14	2	206	Oct 1	"	3
Jan'y 1st)	1923	Jan 20	1	Jan'y 1st)	1933	2/21	1	166	Feb. 15	"	2	207	Jany 1	2/24	4
April 1st)	"	"	1	April 1st)	"	3/31	1	167	Apr. 15	"	2	208	Apr 1	"	4
July 1st)	"	"	1	July 1st)	"	7/24	1	168	June 15	"	2	209	July	"	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10/3	1	169	Aug 15	"	2	210	Oct	"	4)
Jan'y 1st)	1924	Feb. 8	1	Jan'y 1st)	1934	3/30	1	170	Oct 15	"	2	211	Jan 1	2/21	4)
April 1st)	"	"	1	April 1st)	"	"	1	171	Jan. 1	Jan 20	3	212	Apr 1	3/31	4)
July 1st)	"	"	1	July 1st)	"	7/27	1	172	Apr. 1	"	3	213	July	7/24	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	11/16	1	173	July 1	"	3	214	Sept	10/3	4)
Jan'y 1st)	1925	Feby 1	1	Jan'y 1st)	1935	11/16	1	174	Oct 1	"	3	215	Dec	12/19	4)
April 1st)	"	"	1	April 1st)	"	3/25	1	175	Jan 1	Feb. 8	3	216	Mar	3/30	4)
July 1st)	"	"	1	July 1st)	"	6/15	1	176	Apr 1	"	3	217	June	7/27	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10/30	1	177	July 1	"	3	218	Sept	11/16	4)
Jan'y 1st)	1926	Feb 12	1	Jan'y 1st)	1936	10/30	1	178	Oct 1	"	3	219	Dec	11/16	4)
April 1st)	"	May 11	1	April 1st)	"	3-19	1	179	Jan 1	Feby 1	3	220	Mch	3/25	4)
July 1st)	"	"	1	July 1st)	"	7-25	1	180	Apr 1	"	3	221	June	6-15	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	181	July 1	"	3	222	Sept	10-30	4)
Jan'y 1st)	1928	Jany 10	1	Jan'y 1st)	1937	9-12	1	182	Oct 1	"	3	223	Dec	10-30	4)
April 1st)	"	Apr 10	1	April 1st)	"	3-29	1	183	Jan 1	Feb 12	3	224	Mch	3-19	4)
July 1st)	"	"	1	July 1st)	"	6-30	1	184	Apr 1	May 11	3	225	June	7/25	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10-13	1	185	May 1	"	3	226	Sept	"	4)
Jan'y 1st)	1929	Feb 13	1	Jan'y 1st)	"	10-13	1	191	Jan 1	Jan 10	3	227	Dec	9/12	4)
April 1st)	"	July 8	1	April 1st)	"	"	"	192	Apr 1	Apr 10	3	228	Mch	3-29	4)
July 1st)	"	Nov 5	1	July 1st)	"	"	"	193	July 1	"	3	229	June	6-30	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	"	"	194	Oct 1	"	3	230	Sept	10-13	4)
												231	Dec	"	4)
1938															
Jan'y 1st)															
April 1st)		4/26	1									232	Mch	4/26	4 00

Drowned 7/12

[46]



THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA

Council No. 83

Certificate No.

155949

Name: Campbell, Robt. H.

Date of Issue of Membership Certificate: Jan. 2,
1920

Insurance Certificate issued Date.....

Class A. Date.....

Class B Date.....

Age. 23

Date of Birth: Apr. 1, 1896

Place of Birth: Pt. Townsend, Wash.

Application received: Dec. 20/19

Residence:

Representing: J. A. Campbell Co.

Address: Seattle, Wn. and Portland, Ore.

Business: Flour

Recommended by J. W. Watson, E. L. Gehman

Investigating Committee: W. D. Doyle, W. T.
Crandall, T. E. Walker

Report of Committee: OK

Date of Election: Dec. 20/19

Date of Initiation: Dec. 20/19

Name of Beneficiary: Mary B. Campbell

Relationship: Mother

Address: Seattle, Wn.

Changed—Date to

Transfer Card Issued—Date 5/11/1926 To Oregon Council No. 84

Transfer Card Accepted—Date 12/17 as Jan. 1, 1928 from Oregon Council No. 83

Miscellaneous

	Date Paid	Am't.
Application fee	12/20	5.
Initiation “	“	5.
Total		

Credit as follows:	Am't.
1st Indemnity Deposit*)	
Assessment No. 153).....	2.
Dues Account**)	
Quarter Beginning Jan.).....	1.
W. and O. Fund Account.....	3.
	—
General Expense Fund Total.....	4.
	[47]

PLAINTIFF'S EXHIBITS "6" AND "7", Admiralty Jan. 17, 1940, Delinquent Notice and Envelope Mailed July 6, 1938, to Robert H. Campbell.

"The Order of
United Commercial Travelers
U. C. T.
of America
Box 235
Seattle, Washington

Seattle
Jul 6
11 AM
1938
Wash.

Robt H. Campbell
4107 45th Ave N E
"R. H. C. Seattle Wash"

Attention
Final Notice

The Order of
United Commercial Travelers
of America

Seattle, July 5 1938

Dear Sir and Bro.

This Notice Is to Advise You That

Assessment No. 233 Expired 6.30. This must be paid at once or you cannot receive any benefits in case of Accident. The Constitution and By-Laws do not permit me to keep members in good stand-

ing after any assessment or dues become delinquent. Kindly remit at once and not become suspended as per Constitution and By-Laws.

Assessment	\$4
Dues	\$
Total	\$1
	5

Fraternally yours,
 GEO. B. DUNN,
 Secretary-Treasurer,
 Seattle, Council, No. 83,
 P. O. Box 235,
 Seattle, Wash.

Attend to This at Once

10.00 to Bal of year [48]

[Title of District Court and Cause.]

DEFENDANT'S EXHIBITS

DEFENDANT'S EXHIBIT "B-1", Adm. Jan. 17,
 1940. Notice of quarterly installment issued by
 the defendant's office at Columbus, Ohio
 (Sample notice)

"Quarterly Installment No. 239
 of 1940 Annual Assessment

Pays Insurance for January, February and March
 The Order of United Commercial Travelers
 of America

Last day for Payment.....December 31, 1939

Remittance must be made to the Secretary of
 your Council and accompanied by this slip and re-

ceipt card enclosed. Failure to pay installment and Council dues within the above time will invalidate your Insurance. Pay now and be protected.

Date.....

Dear Bro. Secretary:

Enclosed find check for the following—

Quarterly Installment No. 239.....\$4.00

Council Dues 1.00

Total\$5.00

(If you have already paid, disregard this notice)

In case of accident notify Fred S. Stratmann, Manager of Claim Department, Columbus, Ohio, within 30 days.”

DEFENDANT’S EXHIBIT “B-2”, Adm. Jan. 17, 1940, Extract from the January 1940 issue of “The Sample Case”, the national magazine of the defendant

“Installment No. 239

Called Dec. 2, 1939

Expires Dec. 31, 1939

Failure to pay this assessment by above named date as well as all Council dues, forfeits your claim for indemnity. [49]

In Order to File a Valid Claim notice of the accident must be sent to Fred S. Stratmann, Head of Claim Dept.”

DEFENDANT'S EXHIBIT "B-3", Adm. Jan. 17, 1940, Extract from the April 1938 issue of "Seattle Tickler", official publication of the Seattle Council #83, of the defendant

"Secretary's Notes

Boy, Oh Boy! How can you do it? After all the time I have told you about paying the assessments during the month, they are called in order to be able to file a valid claim, Some of Our Boys Are Now Behind and Would Find Themselves Without Benefits or Their Beneficiary Short of the Death Benefits Should Accident and Death Be Their Misfortune. Check up your receipts and if you do not have one for 232, get the five in at once."

DEFENDANT'S EXHIBIT "B-4", Adm. Jan. 17, 1940, Extract from the May 1938 issue of "Seattle Tickler", official publication of the Seattle Council #83, of the defendant

"Secretary's Notes

To be protected in case of accident, it is necessary to have a receipt for assessment 232 and your receipt for dues to June. When we have to suspend a Brother for non-payment of an assessment, it is with deep regrets as we know that this Brother may need the protection more than the Council needs the membership; besides, we don't like to lose a member. We have just completed the Golden

Jubilee drive which secured for Seattle Council No. 83, fifty-six new members, two Gold Medals, three Gold Watches and an Honor Council Altar Cloth, besides the satisfaction of doing a big job well. Thanks to everyone for the co-operation in helping the secretary in his work of getting ready the applications on time.

Look Up Your Receipt and If [50] Not Paid, Send Your Check at Once And you will be on the protected list again. You Might Be Next And You May Not Be Able to Stand the Risk.”

DEFENDANT'S EXHIBIT “B-5”, Adm. Jan. 17, 1940, Extract from the June 1938 issue of “Seattle Tickler”, official publication of the Seattle Council #83, of the defendant

“Secretary's Comments

Assessment 233 was called the first of the month and Must Be Paid during the month of June in order to keep you fully insured so that you can collect should you have an accident. Think Twice Before You Attempt to Carry Your Own Insurance During Vacation Months. Remember the Fourth of July Is Before the 39th of June Takes Just Outside. Five Dollars Paid and Worry Off Your Mind.”

DEFENDANT'S EXHIBIT "B-6", Adm. Jan. 17, 1940, Extracts from the Constitution and By-Laws of the defendant corporation, effective September 1, 1937.

"Insured Membership"

Art II, Sec. 2; page 4, line 10: "Any white male citizen of the United States, Dominion of Canada or British Possessions in North America, of good moral character, and in good physical and mental condition, not under eighteen (18) years and not over fifty-five (55) years of age, who is classified as a preferred risk and is engaged either as a traveling man or in business or professional occupations, may become an insured member of this Order, if found acceptable; provided, however, any applicant not classified as a preferred risk may be accepted as an insured member of this Order, if he is willing to accept a rating based upon the occupational rating fixed by the Conference Manual published by the Health and Accident Underwriters revised to May 1, 1925, on the percentage basis outlined in Article IV, Section 7, herein."

* * * * *

Art. II, Sec. 3; page 7, line 18: "All members of the Order shall be considered in good standing only so long as they pay, when and as the same becomes due and payable, all fees, fines, costs dues and assessments charged and levied against them and support the principles of the Order and faithfully observe its Constitution, By-Laws, Rules and Edicts

approved by the Supreme Executive Committee or the Supreme Council, as such Constitution, By-Laws, Rules and Edicts now exist, or as they may hereafter be added to, revised or amended.”

* * * * *

[51]

“Associate Membership”

Art. II, Sec. 4; page 8, line 6: “Any white male citizen not under eighteen (18) years of age, residing in the jurisdiction of the Supreme Council, who is interested in the work of this Order from a fraternal or business promotion standpoint, may make application for Associate Membership as hereinafter provided for in this Section and if found acceptable, shall be entitled to become an Associate Member, but such member or his beneficiary shall not receive any financial benefits.”

* * * * *

Art. II, Sec. 4; page 8, line 38: “Such Associate Member shall pay to his Local Council the regular local council dues plus Fifty (50) Cents for annual subscription to The Sample Case.”

* * * * *

“Delinquency”

Art. II, Sec. 8; page 11, line 40: “Any member who fails to pay fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and he, his beneficiaries or any-

one claiming under his Membership or Certificate of Insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his Certificate of Membership or Insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.

“Suspensions.

“Should any delinquent member fail to restore himself to good standing within thirty (30) days from the date of such delinquency, the Secretary-Treasurer of his Local Council shall immediately suspend him from membership and insurance in the Order. Such Secretary-Treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his Local Council at its next regular meeting.

“Failure to suspend a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for in this Section, and the Officer so failing to

suspend may be summarily removed from office by the Supreme Counselor.”

“Reinstatement”

Art. II, Sec. 9; page 12, line 34: “Any one suspended under provisions of the foregoing Section or who has withdrawn [52] from the Order, and who is not over sixty (60) years of age, desiring reinstatement, may make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended or had withdrawn to any Council within whose jurisdiction he resides and shall accompany such application with a reinstatement fee in a sum equal to the dues for the current period in which he applies for reinstatement and, should application of a suspended or withdrawn member be made to a Council other than the one from which he was suspended or withdrawn, written permission to reinstate must be obtained from the Council from which he was suspended or withdrawn, signed by the Secretary and bearing the seal of the Council, and said written permission, together with the amount of one assessment, must be attached to the application when forwarded to the Supreme Office. On receipt of such application and payment, the Secretary-Treasurer shall present such request at the next regular meeting of his Council. Each application shall be referred to a committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if

not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership, subject to the approval of the Supreme Executive Committee. Provided, however, anyone suspended under the provisions of the foregoing Section, who desires reinstatement within ninety days of the date of his suspension, may be reinstated by signing a statement prepared by the Supreme Executive Committee, that his mental and physical condition is not impaired in any way that would render him undesirable for insurance and the payment of such pro-rata portion of the annual assessment as may be fixed and determined by the Supreme Executive Committee and a sum equal to the dues for the current period. Provided, however, such suspended member who has put in an application for reinstatement within ninety (90) days of the date of his suspension, who is over sixty (60) years of age, may be reinstated upon submission of a satisfactory medical report made at the applicant's own expense by a physician or surgeon selected by the Order. The Secretary-Treasurer shall forward the statement, together with the amount of one assessment to the Supreme Secretary, and if the application is approved by the Supreme Executive Committee, the Supreme Secretary shall make record of the reinstatement and forward a statement to the applicant showing such reinstatement.

“The right of such applicant or his beneficiary to fraternal privileges of the Order or indemnity under the provisions of Article IV, shall not accrue until twelve o’clock noon, Eastern Standard Time, of the day upon which his application is approved by the Supreme Executive Committee.

“At the next meeting of the Council, the Secretary-Treasurer shall report the reinstatement and record it in his minutes.”

“Meetings and Quorum.”

Art. II, Sec. 24; page 23, line 12: “All Local Councils shall hold regular meetings at least once each month, upon a stated date fixed by the Council.”

* * * * *

[53]

“Article IV.

“Insurance.”

Article IV, Section 1; page 30, line 19: “An annual assessment in the amount of Sixteen (\$16.00) Dollars shall be charged against all insured members on December 2 of each year. Special assessments not exceeding four (\$4.00) Dollars may be levied by the Supreme Executive Committee as often as the needs of the Order require. The annual assessment may be paid annually, semi-annually or quarterly, but in any event, payments of not less than Four (\$4.00) Dollars are due and must be paid on or before December 31, March 31, June 30 and September 30 of each year.

“No newly initiated member, however, shall be assessed for any purpose named in this Section within two (2) calendar months succeeding that within which his Certificate of Insurance was issued. Thereafter such newly initiated member shall pay his pro-rata portion of said annual assessment in the manner and amount set forth in the preceding paragraph.

“No formal or official notice of said annual assessment or of the date or dates when same, or instalments thereof, become due and payable, shall be made but information relative thereto may, in the discretion of the Supreme Executive Committee be disseminated to the members by publication in the Sample Case, the official magazine of the Order, or by mail; provided, however, that such publications or communications, in whatever form made, shall not be considered as a formal or official notice and failure to receive same shall not constitute or be deemed a waiver of the provisions contained in Article II, Section 8 herein, relative to Delinquency and Suspension.”

* * * * *

“Cancellation of Insurance Certificates.”

Art. IV., Sec. 2; page 31, line 15: “If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void from and after such suspension without the necessity of any formal record of cancellation. [54]

Art. IV, Sec. 13, p. 47, line 37:

“Waivers”

“No Grand or Local Council, officer, member or agent of any Local, Grand or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted.”

[Title of District Court and Cause.]

PLAINTIFF'S ABSTRACT OF TESTIMONY

Be it remembered that on the trial in this court of the above-entitled cause at the November term of 1939, the Hon. Charles C. Cavanah presiding;

Plaintiff appearing in person and by her attorneys, Wheeler Grey and Harry B. Jones, Jr. of the firm of Jones & Bronson;

Defendant appearing through its attorneys, W. R. McKelvy and Frederick V. Betts of the firm of Skeel, McKelvy, Hencke, Evenson & Uhlmann, the following proceedings were had commencing on January 17, 1940, to-wit:

A jury was impanelled and sworn according to law to try the cause.

Mr. Grey: "At this time, Your Honor, the plaintiff would like to offer in evidence insurance certificate No. 155949. * * *

The Court: It will be admitted."

(Plaintiff's Exhibit No. 1, Insurance Certificate, admitted in evidence.)

Mr. Grey: "At the same time, and for the purpose of completing the record of what was issued to Mr. Campbell on January 3, 1920, we offer a certificate by the Supreme Council stating that Mr. Campbell has been admitted to membership in the order and is a member in good standing; and, of course, that too is subject [55] to the admission of the present constitution and by-laws by the defendant.

Mr. McKelvy: I have no objection, your Honor.
The Court: Admitted."

(Plaintiff's Exhibit No. 2, certificate of membership, admitted in evidence.) Tr. 3.

Mr. Grey: "We should also like to offer in evidence a printed copy of the constitution and by-laws of the defendant, effective as of September 1, 1919, which have been certified by the Supreme Secretary of that time. * * *

The Court: It will be admitted. Overruled. We will see what develops."

(Plaintiff's Exhibit No. 3, constitution and by-laws of 1919, admitted in evidence.) Tr. 5.

Testimony of

HELEN P. LEGHORN

for Plaintiff

Helen P. Leghorn, produced as a witness for the plaintiff, being first duly sworn, testified on direct examination to the following facts:

I am a tax accountant and previously an assistant deputy commissioner to the Insurance Commissioner. I have custody of the constitution and by-laws filed by fraternal benefit societies. Exhibit No. 3 is the constitution and by-laws of the Order of United Commercial Travelers of America, as filed in the office of the Commissioner of Insurance of the State of Washington. Exhibit No. 3 was filed on March 3, 1920. No other constitution and by-laws

(Testimony of Helen P. Leghorn.)

was filed by the Order between September 1, 1919, and January 3, 1920.

Cross Examination by Mr. McKelvy

The fraternal companies are not required to file all their by-laws but we request them to do so so that we may have them of record. Tr. 7. [56]

Testimony of

GEORGE B. DUNN

for Plaintiff

George B. Dunn, produced as an adverse witness by the plaintiff, being first duly sworn, testified on examination to the following facts: Tr. 10.

I was subpoenaed to bring the book of account sheet which is headed, "Campbell, Robert H., Certificate No. 155949." I was also subpoenaed to bring in all letters, documents and applications in the possession of The Order of United Commercial Travelers of America relating to the suspension and the reinstatement to membership in said order of Robert Henry Campbell, occasioned by or resulting from the non-payment of dues. We have no records of suspension for dues because the suspensions are made in Columbus, Ohio. The only records which I would have showing whether Mr. Campbell was suspended from membership for non-payment

(Testimony of George B. Dunn.)

of dues and reinstatement is my cash book which I have here with me.

(At this time the witness produced and there was admitted in evidence, without objection, Plaintiff's Exhibit No. 4, account sheets, and Plaintiff's Exhibit No. 5, account sheets. Due to the fact that the Court has advanced the trial date, the required period of ten days since the service of a request for admission under Rule 36 has not expired.) Tr. 12. Defendant admits, for the purposes of the record, that Plaintiff's Exhibits Nos. 4 and 5 are genuine.

Plaintiff's Exhibit No. 4 shows that he applied for membership on the 20th of December, 1919. Certificate of membership was issued to him on January 2, 1920. Plaintiff's Exhibit No. 2, the insurance certificate, shows the effective date January 3, 1920, signed in Columbus, Ohio. (Tr. 14) I have been a member of the organization for forty years and have been secretary for thirteen or fourteen years. Plaintiff's Exhibits No. 4 and [57] No. 5, account records, show two separate accounts, dues accounts and assessment accounts. (Tr. 20) These records show that dues payable January 1, 1921 were paid February 1, 1921. That was a period of thirty-one days. He was not late in his payment at that time. If he was suspended from membership, the records would be marked "Suspended". I mark them on my ledger sheets which is the practice of secretaries of the organization, but I do not know what the

(Testimony of George B. Dunn.)

previous secretary did in this regard. The dues payment due on January 1, 1922, were paid January 14th.

Mr. Grey: "Do your records show that Mr. Campbell was suspended from membership?"

Mr. McKelvy: I want to interpose an objection at this time. Apparently it is counsel's theory that because this man was late on other occasions from time to time that there was a waiver of some kind. In view of the provisions of the contract itself, I object to the question and his line of testimony on the ground that it is wholly immaterial and irrelevant and incompetent as to the fact that he may have been late on other occasions." (Tr. 21)

(The jury was excused from the jury box and the court heard argument of counsel after which the defendant's objection was overruled.)

The Court: "The recent decision of the Supreme Court of the United States, as to the highest court of the state in which they were trying it, is binding and final upon the federal courts, and we have to follow those decisions. That is a recent decision. Now, that revolutionizes the principle of law applicable to federal courts. The Supreme Court of this state I see has adhered to that principle, where an insurance company, although it may have a provision in its constitution and by-laws, and even in its certificate of insurance, has accepted thereafter [58] from time to time assessments and dues upon a pol-

icy from the insured, although there may have been a previous delinquency, that it waives the question that the insured is not entitled to enforce that policy. That delinquency, of course, would be deducted from whatever recovery, if any, was had in the case. The company would be entitled to that payment. But I see they hold, in a large number of cases—the Supreme Court of this state has held to that principle, because the insured has been led to believe that from year to year that he was insured.

Now, why did they accept these dues from year to year? Where the party goes on and continues carrying out this contract and accepting dues, and they lead the insured to believe that they are protecting the insured, the Court has held that that is a waiver. The Supreme Court of this state has held to that effect in a lot of cases. To do otherwise would be highly inequitable. It puts the insured where he could go out and get other insurance, but now he relied upon that. If he did, that is the principle. I follow your contention in the matter. The objection will be overruled. I understand that is the principle of law, that you are permitted to offer evidence, to see what the evidence is, and you offer it on that ground, and not upon the question of notice, failure to give notice.”

(The jury returned to the jury box).

The dues which were due on January 1, 1923, were paid January 20th. It was not a late payment. (Tr. 24)

(Testimony of George B. Dunn.)

Mr. Dunn: "Back in the days of '20, '21, and '22, they had thirty days after it was called. They had it back in those early years; they had thirty days. Now, the constitution was changed back in there sometime, where they made a change in the date of the call, and they had to be paid at the end of that call and never had thirty days. The calls were later than they are [59] today. I don't know just the date of that call. * * * I can't tell you in which copy of the constitution and by-laws that change appears." (Tr. 24, 25)

Dues are called at the same time assessments are. They are due for a year on the 1st day of January, \$4.00 a year. They can be paid quarterly, payable in advance, the same as assessments are. The various quarters begin on the 1st of January, the 1st of April, July and October. (Tr. 27) The quarterly payment of dues which were due on January 1, 1923 were paid January 20th. The record does not show that Mr. Campbell was suspended from good standing and membership in the organization by reason of that payment twenty days after January 1st. He had thirty days in which to pay them. Quarterly payment due on January 1, 1924 was paid February 8th. The record does not show that Mr. Campbell was suspended from membership by reason of the fact that the payment was made thirty-nine days after January 1st. Quarterly dues payable January 1, 1925 were paid February 1st. The records do not show that Mr. Campbell was suspended because the payment was made thirty-one

(Testimony of George B. Dunn.)

days after January 1st. Those due January 1, 1926 were paid February 12th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-three days after January 1st. Those due April 1, 1926 were paid May 11th, forty-one days after April 1st. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-one days after April 1st. Those due January 1, 1928 were paid on January 10th. Those due April 1, 1928 were paid April 10th. Those due January 1, 1929 were paid February 13th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-four days after it was due on January 1st. (Tr. 31) I became secretary of this Order thirteen or fourteen years ago, [60] long about 1928. Quarterly dues payment on April 1st were paid July 8th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made ninety-nine days after it was payable on April 1st. Those due July 1, 1929 were paid November 5th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made one hundred twenty-eight days after it was due. Payment due October 1, 1929 was paid on November 5th. He was not suspended because the payment was made thirty-six days after it was payable. Those due on January 1, 1930 were paid February 1st. The records do not show that Mr.

(Testimony of George B. Dunn.)

Campbell was suspended by reason of the fact that the payment was made thirty-one days after it was due. Our records do not show that Robert Henry Campbell was suspended by reason of the fact of non-payment or late payment of dues and assessments at any time prior to June 30, 1938. (Tr. 33) The dues payable January 1, 1931 were paid March 12th. Those due on January 1, 1932, paid February 24th. Those due January 1, 1933, paid February 21st. Those due on July 1, 1932, paid July 24th. Thoses due on October 1, 1932, paid October 3rd. The January 1, 1934 dues were paid March 30th. Those for July 1, 1934, paid July 27th. Dues for October 1, 1934, paid November 16th. Those due October 1, 1935, paid October 30th. Payment due on July 1, 1936, paid March 19th. They were paid in advance. Those due on October 1, 1937 were paid on July 25th, paid in advance. Those due on July 1st were paid on July 25th, at the same time.

Mr. Grey: "I see. Now, will you turn your attention to the assessment account column and direct your attention to assessment No. 165; when was that called?

A. 165?

Q. Yes. [61]

A. That was called December 15.

Q. And when was it paid?" (Tr. 35)

Assessment No. 165 was paid January 14th. Assessment No. 171 called January 1st, paid January 20th. Assessment 175 was called January 1st, paid

(Testimony of George B. Dunn.)

February 8th. Assessment No. 179 was called January 1st, paid February 1st. No. 183 was called January 1st, paid February 12th. The assessments don't relate particularly to years. They relate to the number of the assessment. (Tr. 37) Assessment No. 165 was in 1922. Assessment No. 171 was called January 1, 1924, and paid January 20th. Assessment 175 was called January 1, 1925, paid February 8th. No. 179 was paid on January 1, 1926. Assessment No. 183 was called January 1, 1926, and paid February 12th. Both the dues and assessments are paid at the same time. Assessment 184 due April 1st, paid May 11th. Assessment No. 191 was due January 1st, paid January 10th. I am not sure of what year. Assessment No. 192 was due April 1st, paid April 10th. 195 due January 1st, paid February 13th. 196 due April 1st, paid April 13th. No. 197 due July 1st, paid July 8th. 198 due October 1st, paid November 5th. 199 due January 1st, paid February 1st. No. 203 was due January 1st and paid March 12th. Assessment 204 due April 1st, paid June 11th. Assessment No. 207 was due January 1st, paid February 24th. No. 211 due January 1st, paid February 21st. No. 213 due July 1st, paid the 24th of July. No. 217 was due July 1st and paid July 27th. Assessment 218 was due October 1st, paid November 16th. Assessment No. 222 was due September 30th and paid October 30th. Assessment 225 was due June 30, 1936, paid July 25, 1936. No. 230 was due September 30, 1937,

(Testimony of George B. Dunn.)

paid October 13th. No. 232 was due in March, 1938, payable any time up to March 30th, actually paid April 26th. [62]

Mr. Grey:

“Q. Now, do your records show when assessment No. 233 was called?

A. It hasn't been entered on his book because it wasn't posted at that time. It was called in June.

Q. Was it paid? A. Never paid.

Q. Your books show that it was not paid?

A. Yes, sir.” (Tr. 44)

Dues and assessments are both called at the same time. Assessment No. 233 was called the 1st of June, payable during the month of June, but it was never paid. The dues were not paid either. The last payment was made on April 26, 1938.

Mr. Grey:

“Q. Now, is your habit to collect all dues from members as of the day they are due?

A. We receive them. We don't have to go out and make any collections whatever.

Q. What happens if they are not paid on the day they are due?

A. Well, our customary custom is to mail them out a delinquent notice as soon as we can get to it after the 1st of the month, past due, notifying them that they have no protection until their insurance is paid. Then if we would meet them on the street, we would tell them. It is just a matter of courtesy.” (Tr. 45)

Testimony of

ARTHUR C. MERRILL

for Plaintiff

Arthur C. Merrill, produced as a witness on behalf of the plaintiff, being first duly sworn, testified on direct examination to the following facts: (Tr. 46)

I was associated in business with Robert Henry Campbell. I received a notice of the fraternal order. I did not see this notice until after Mr. Campbell's death. [63]

Cross Examination by Mr. McKelvy

I saw the notice at the office. Mr. Campbell and I had the same office. It was addressed to his residence. He apparently brought it from his residence to our place of business. (Tr. 47)

Testimony of

ESTELLE CAMPBELL

for Plaintiff

Estelle Campbell, plaintiff in the action, testified on direct examination to the following facts:

I am the plaintiff in this suit and Robert Henry Campbell was my husband. After his death I returned to our home.

(The jury retired for the noon recess after which the following testimony was taken). (Tr. 49)

(Testimony of Estelle Campbell.)

The accident happened in Oregon on July 12th and we came back to Seattle on the following Thursday, which was the 14th. Before I got home neighbors had gone into the house to make it as pleasant as possible and had taken the mail out of the box. The mail box is inside a coat closet but I didn't see this until the following morning (referring to Plaintiff's Exhibit 6 which is an envelope and 7 which is a notice and which was found inside the envelope.) When the envelope was brought to me it had not been opened. The mail had all evidently been taken out of the box and all placed some place. Nobody thought about the mail, of course, until all this was over. Exhibit No. 7 is a notice to Mr. Campbell that he is owing the defendant \$4.00 and it carries the date July 5th. The date stamped on the envelope, Plaintiff's Exhibit No. 6, is July 6th and it is from the United Commercial Travelers.

(Plaintiff's Exhibits 6 and 7 were admitted in evidence without objection.) (Tr. 51)

Mrs. Campbell continuing: The first time I saw this envelope, it was sealed. I opened it. I went to Oregon on this occasion just after school closed, about June 18th. Mr. Campbell [64] came down on July 2nd.

(Plaintiff's Exhibits 4 and 5 were admitted in evidence without objection.)

(Testimony of Estelle Campbell.)

Cross Examination by Mr. McKelvy

I wouldn't know whether Mr. Campbell received a notice around or about the 1st of June of the fact that the payment would be due on June 30th. (Tr. 55) I think Mr. Campbell received a magazine called "The Sample Case" from the United Commercial Travelers. I don't think I ever did look through it. I don't suppose I ever did see any installment notice as indicated in the magazine.

Whereupon the plaintiff rested. (Tr. 57)

Defendant's Testimony

Testimony of

GEORGE B. DUNN

for Defendant

George B. Dunn, produced as a witness on behalf of the defendant, having been previously sworn, testified on direct examination to the following facts: (Tr. 57)

The Supreme Council at Columbus, Ohio, sends out a call or a notice thirty days before an assessment is due. I just wait for the payment to come in and if I do not receive it within a few days after the time it is due, I mail out a notice to the member showing that it has not been received by me and that the policy is delinquent in so far as the payment is concerned. Defendant's Exhibit B-1 is a notice similar to those sent out by the Supreme Council thirty days before the due date.

(Testimony of George B. Dunn.)

(Defendant's Exhibit B-1, delinquent notice, admitted in evidence without objection.) (Tr. 61)

Our organization publishes a magazine called "The Sample Case" and in each issue of the magazine which comes out twelve times a year, there appears a notice of the due date for the next [65] assessment. Exhibit B-2 is one of the issues of the magazine. The wording of the notice in that issue of the magazine is almost identical to the one that went out June 1, 1938.

(Defendant's Exhibit B-2, issue of "The Sample Case", admitted in evidence without objection.) (Tr. 63)

I publish a magazine here in our local council. It is published every month. This publication was mailed to Mr. Campbell.

(Defendant's Exhibits B-3, B-4 and B-5, issues of official publication, admitted in evidence without objection.) (Tr. 64)

The 1937 constitution and by-laws were effective in July, 1938, when Mr. Campbell died.

(Defendant's Exhibit B-6, 1937 constitution and by-laws, admitted in evidence without objection.) (Tr. 65)

Cross Examination by Mr. Grey

I send out what is called a courtesy notice of delinquency to each member after the date upon which the assessment was due. It is not compulsory. Plain-

(Testimony of George B. Dunn.)

tiff's Exhibit No. 7 is the notice I sent out in this case. If the sum was not paid at the end of the thirty day period after it was due, we entered the member in our suspension account. I never entered Mr. Campbell as suspended. He always paid within the time. (Tr. 65)

Redirect Examination by Mr. McKelvy

Mr. McKelvy:

“Q. What was your practice so far as sending in suspensions were concerned, as distinguished from delinquent members?

A. At the end of the thirty-day period, we had to send them in.

Q. Well, send them in as what?

A. On our reports to Columbus.

Q. Well, what do you mean by the thirty-day period? [66]

A. Well, they have thirty days to pay it in.

Q. Thirty days after what?

A. After the call. If they don't pay it within thirty days, then I have to report them suspended. If they pay it during the thirty days, I enter them in as insured members again.

Q. And when does your report go in?

A. As soon after the first as I can complete it. I have to have them in before the fifteenth.”

Defendant's Exhibit B-7 is a photostatic copy of Mr. Campbell's application for insurance.

(Defendant's Exhibit B-7, photostatic copy of application, admitted in evidence.) (Tr. 67)

(Testimony of George B. Dunn.)

Recross Examination by Mr. Grey

Under the 1937 by-laws, quarterly assessments are due and must be paid on or before December 31, March 31, June 30 and December 30 of each year. As an example, on the first day of December the Columbus headquarters sends to each person a notice that on or before December 30th they must pay the \$4.00 assessment due on that day. I receive payments that are made prior to December 30th. If anyone does not pay by December 30th they become delinquent. If he did not pay his assesment by January 30th, then on the next day I marked him and reported him as suspended. I never marked Mr. Campbell as suspended because he never ran over that extra month according to my records

Redirect Examination by Mr. McKelvy

“Q. Just one question here. Did you distinguish between delinquency and suspension?

A. We do, yes, because we don't enter them as suspended until the end of our thirty-day period.

Q. That is what I was getting at. I am not so sure but what you and Mr. Grey were using words at cross purposes, delinquent [67] and suspension. When is a man delinquent?

A. According to the constitution, he is without coverage, without any insurance the first day after

(Testimony of George B. Dunn.)

it is delinquent, according to his payment, his first thirty days.

Q. The first day after the insurance isn't paid, he is delinquent? A. Surely.

Q. And when does he become suspended?

A. After thirty days. That is when I have to enter him in my list."

The defendant rests. (Tr. 73)

Plaintiff has no rebuttal.

(Whereupon the jury was excused from the jury box and in their absence the following proceedings occurred.)

Mr. McKelvy: "Comes now the defendant, all parties having rested, and at this time challenges the legal sufficiency of the plaintiff's testimony to make out a case to go to the jury and moves the court to dismiss the action and to instruct the jury to return a verdict in favor of the defendant as a matter of law, on the grounds and for the reason that the plaintiff has failed to sustain the burden of showing that the policy in question or the insurance certificate in question, was in good standing and in full force and effect at the time of the death of the decedent, for the reason that the defendant has affirmatively shown that the policy was not paid up, that it was in default, and that the member was

delinquent at the time of his death. The plaintiff has failed to sustain her allegation that there was a waiver on the part of the defendant, or that the defendant is estopped at this time from asserting the fact that the policy was not paid up at the time of the accident.” (Tr. 74) [68]

Defendant was granted a request to withdraw his motion for a directed verdict at this time and to have the privilege of reopening the case.

Whereupon an adjournment was taken until ten o'clock A. M., January 19, 1940, at which time proceedings were resumed as follows:

J. W. WATSON,

witness for Defendant

J. W. Watson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows: (Tr. 76)

Some years ago I was connected with The United Commercial Travelers of America. I took the application of the deceased, Mr. Robert H. Campbell. I was secretary-treasurer and as part of my duties I was to keep a record of all the proceedings and collect all the moneys when assessments were called and make remittances to the Supreme Council. (Tr. 77)

(All further testimony of this witness pertained to matters not a part of this appeal and therefore omitted).

Defendant renews its motion for a directed verdict.

The Court: “Well, I think I understand you gentlemen’s contention. I have given you about two hours here this morning. It is just a question of whether this case should go to the jury, first, upon the credit, a sufficient amount due the insured to cover the last defaulted installment due at the time of his death; and second, whether or not the company, by its course of dealings in the past and its conduct, is estopped and has waived the provisions of the contract of insurance which requires payments to be made at the time they are due.

Now, I observed from the Supreme Court, that where an insured is in default in payment, and the company fails to give him notice or to object to his continuation of his default [69] before he dies, that the past course of conduct in each particular case—it is to be considered whether the company has waived and is estopped from asserting its provision in its contract of insurance of prompt payment of these premiums.

Now, we have here a notice that was given to this insured after he was delinquent on his last payment. On July 5 it was mailed; and previous to that time, it seems, under the testimony here, which is undisputed, similar kinds of notices were given to persons who held policies in this company, a matter that they call a courtesy notice. It doesn’t make any difference whether they call it a courtesy notice,

or whether they were obligated to give a notice or not. The question is, did they notify him?

If they notified him, and he received it before his death, to come in and pay this delinquent assessment, and he didn't do so, under this holding of the Supreme Court there wasn't any waiver or estoppel. They discuss the form of instruction given by the trial court, and approve that instruction; and in that instruction, the Court says without giving notice to the insured, they didn't object to the continuation of the policy by reason of the default payment.

Now, if this company hadn't given this notice, there is no question to my mind but what it is a question for the jury as to whether there is a waiver or estoppel.

Now, the next question is, did he get the notice before he died? The notice was given on the 5th of July, it is dated here, and mailed in this city. This man, the evidence shows, was out of the city at that time; and from there on until his death—his death occurred, I believe, in Oregon—he didn't receive it. It was afterwards taken out of the postal box here in an envelope, after his death, so apparently he didn't receive the notice. That is undisputed. [70]

Now, that being the case, if he had received the notice, doesn't this case come under these numerous decisions of your State Supreme Court—and I think there are other decisions I find also adopting that principle—where a company adopted a course of dealing and conduct with an insured, allowing him to make the payment of default premiums at certain times, over a course of years, and if a diligent, prudent person had reason to believe that the company would continue, and acting as a diligent, prudent person, relied upon that course of conduct in failing to pay this premium before the 12th of July.

As to that question, gentlemen, in failing to get this notice before his death, it would be a question for the jury. I will have to submit that to the jury. Under the present decisions of your State Supreme Court and other decisions, I am satisfied that from the condition this record is in I will have to submit that to the jury, with an instruction relating to it.

Now, as to the question of credit, I think mathematically, gentlemen, that this record has been explained by this company, and it is not disputed, that the amount deposited in issue, the payment of \$10.00, has been accounted for by this company under their by-laws and constitution. It has been accounted for; \$2.00 commencing on this policy, which went into effect in January, on Assessment 154. The other \$8.00 was properly accounted for as to its application. It is undisputed, the record is undisputed, and it would be a question for the jury;

there would be a legal question as to the credit, but there is no dispute except as to the number of the assessment 153 and 154, and afterward it was made to 154.

What the Court is concerned with, was this \$10.00 properly applied and charged properly against this insured on his policy, and under the by-laws and constitution of the company, [71] which was a part of his contract of insurance. I think the company has accounted for that, without any disputed testimony. Therefore a credit is not due.

Now, if during the period of suspension, whether they should charge, I see under the by-laws here that that is merely reinstating himself on paying him up. That is in the by-laws, so there wouldn't be a question of credit on any installment. The by-laws are clear, that that merely gives them the right to come in and reinstate themselves upon paying up the premiums that were due, covering also the period of suspension.

So, I am satisfied that the by-laws and constitution wouldn't allow a credit for the period of suspension. That is very clear, and that is part of the contract. So I think, gentlemen, I will have to submit this case to the jury upon one issue, whether or not there was a waiver or whether the company is estopped by reason of its back dealings and conduct in accepting these default payments or delinquent payments at the times it did over this course of years, and whether this man received proper notice of any changed conduct before he died. The

notice evidently says so, given on the 5th; but there is evidence here disputing whether he ever received it or not before he died. It was mailed on the 5th, and the man died on the 12th, seven days after.

I think it clear from the evidence that he did not receive it. It wasn't taken out of the post office until after his death, and delivered to the plaintiff here, sealed in an envelope, having gone through the postal service.

So I think I will submit the case to the jury on that issue. That is the way it appears to me on the undisputed testimony. You may call the jury in.

Now, don't you think you can argue this case in about thirty-five minutes on a side, instead of spending all afternoon? [72] There is just one issue.

Mr. McKelvy: "Yes, that is enough for me. I understand, Your Honor, thirty-five minutes?"

The Court: "Yes.

Mr. McKelvy: "That is enogh for me.

The Court: "I think that is the only issue, the way I look at the case, to go to the jury."

After argument, the court denied the motion as to all matters pertaining to the question of waiver and estoppel, submitting that matter to the determination by the jury, but granting the defendant's motion as to the plaintiff's claim of an existing credit in favor of the deceased member, Robert H. Campbell.

Argument of counsel. (Tr. 98)

Thereafter the court instructed the jury as follows:

The Court: “Ladies and gentlemen of the jury, I ask your patience for a few moments in presenting the instructions of the Court and the issue involved here and the principles of law applicable thereto.

This case has narrowed itself down, which I will call your attention to, to but one issue of fact for your determination. (Tr. 98)

You doubtless understand the investigation that we have been engaged upon involves a question of whether or not the plaintiff is entitled to recover the sum of \$5,000 alleged in her complaint, and I hardly need to say to you that, after listening to the trial of the case and the argument of Counsel, it is necessary to recall ourselves to the precise nature of our duties and responsibilities as jurors and judges, that responsibility being to decide the issues and controversies fairly from the evidence and under recognized principles of law. [73]

The function you perform in a case of this kind, the duty you perform is an important and necessary one. When you go to your jury room and come to consider your verdict you will lay aside all suggestions which merely appeal to your feelings or prejudices or emotion, regardless of on which side they may have come in the case, and pass on it. Sometimes incidents inadvertently come into the trial of a case which really have no bearing on it; and unless we are careful, our judgment may be somewhat disturbed thereby. So, when you come to the consideration of what your verdict should be, you

should be careful to confine that consideration to the evidence, and all of the circumstances in evidence, and only the fair inferences that may be drawn therefrom.

For me to analyze in detail the pleadings in the case and the evidence would necessarily make the instructions unreasonably long. Therefore I shall avoid doing anything more than bringing to your attention a fair outline of the real issues and of the principles of law which are applicable and which you will follow and apply to the evidence in making up your verdict.

When you go to your jury room, if you desire, you may have the pleadings in the case. (Tr. 99)

Now, you recall that we are now considering a contract of insurance; and, as part of that contract of insurance, the constitution and by-laws of the defendant company are a part thereof; and as a part of that constitution and the contract here, we find in part, at the time of the death of Robert H. Campbell the following provisions:

‘Any member who fails to pay fees, fines, costs, dues, or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and [74] he, and his beneficiaries, or anyone claiming under his membership or certificate of insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While

he thus continues a delinquent member the sending to him of notice of any assessment or the making on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

‘Should any delinquent member at any time, regain his good standing in The Order, his restoration shall in nowise operate to entitle him or anyone claiming by, to or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.’ (Tr. 100)

We find that it is further provided in the constitution and by-laws of the company, in existence at the time of the death of Robert H. Campbell, and it is a part of this contract, the following provision:

‘Should any delinquent member fail to restore himself to good standing within thirty days from the date of such delinquency, the secretary-treasurer of his local council shall immediately suspend him from membership and insurance in The Order. Said secretary-treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his local council at its next regular meeting.

[75]

‘Failure to suspend a delinquent member, under the provisions of this action, shall not

constitute nor be deemed a waiver of the forfeiture provided for in this section.'

I will say to you that you are instructed that there is but one issue of fact for you to determine in this case, from the evidence and under the instructions of the Court, and that is, 'Did the defendant company waive its right to insist upon the forfeiture of the certificate of insurance by reason of the non-payment of the last assessment?' And if you find that the defendant company did not waive such right, then your verdict will be for the defendant. On the other hand, should you find that it did waive such right, then your verdict will be for the plaintiff. (Tr. 101)

I will say to you further that if you find, from a fair preponderance of the evidence, that Robert Henry Campbell habitually paid the assessments and dues due under the certificate of insurance at periods ranging from time to time later, and that the defendant company received them without putting into effect the penalty provisions set forth in its constitution and by-laws and without forfeiting the certificate and requiring Robert Henry Campbell to formally apply for reinstatement, and if you further find that, by such course of dealing, Robert Henry Campbell, as a prudent person, was led to believe and did believe that he was making these payments in a manner satisfactory to the company, and that the custom and conduct of the company in receiving these payments without insisting upon

the penalties and forfeitures required by the constitution and by-laws were calculated to lead an ordinarily prudent person to so understand and believe, and that he was thereby induced so to believe at all times prior to his death, and that at the time of [76] his death he was induced to believe and did believe that the certificate was in full force and effect, then the company is estopped and has waived its right to insist upon the forfeiture of the certificate by reason of the non-payment of the last assessment, and in that case your verdict should be for the plaintiff. (Tr. 102)

Now, in passing upon the issues in this case, the burden is upon him who asserts the existence of the fact to establish it; and in a civil action of this kind such as we are considering, to establish it by a preponderance of the evidence. The burden is therefore upon the plaintiff in the first instance to show, by a preponderance of the evidence, the cause of action set forth in her complaint; and in determining the credibility to be given to the testimony of any witness, you have a right to take into consideration his or her interest if any in the result of the case, his or her demeanor on the witness stand, his or her candor or lack of candor and all other facts and circumstances which would influence you in determining whether or not the witness has told the truth. Bring to bear your common sense and experience in hearing the testimony and passing upon the credibility of the witness.

Now, preponderance of the evidence does not necessarily mean the greater number of witnesses, but a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this side or that. It is that which is more convincing, more persuasive.

The burden therefore is upon the plaintiff in this case, in the first place, to show by a preponderance of the evidence that the defendant is liable in the respects charged in the complaint as to which I have called your attention, and under these instructions.

[77]

If your verdict should be for the plaintiff, then you are instructed that it shall be in the full sum of \$5,000. All of you must agree in finding a verdict. Forms of verdict have been prepared in the case. You will have no difficulty in using them. If you find in favor of the plaintiff, one will be used where the blank is left, in which you may insert the amount of \$5,000. If you find for the defendant, you will use the form of verdict in which there is no blank space. (Tr. 103)

When you agree upon your verdict, if you do, have your foreman sign it and return it into court. If you desire any of the exhibits, just notify the bailiff, and the clerk will send them in to you. Here are the forms of verdict, Mr. Bailiff, you may hand them to the jury. You may retire.

(Whereupon the jury retired to consider of its verdict.)

Mr. McKelvy: Your Honor, the defendant has some exceptions to take. Let the record show that the defendant at this time, in the presence and hearing of the Court, and before the jury retired, objects to the refusal in giving the following instructions, for the following grounds and reasons:

First, as to the instructions in which the court submitted the question to the jury as to whether or not the defendant pursued any course of conduct or action that could be construed as a waiver of the prompt payment of premiums, for the reason that there is no evidence in the record to justify the instruction.

Second, the court's instruction relative to advising the jury that they might find that the defendant had waived its right to prompt payment, for the reason that if they found that it failed to enforce a penalty or to enforce the provisions of its constitution and by-laws or of its contract, this is particularly an erroneous statement of law, for the reason that under the particular contract in question, the defendant was bound to accept late payments, by virtue of its contract, and [78] in the acceptance of these late payments, it would be purely in performance of the provisions of its contract, and could not under any theory be construed as a waiver. (Tr. 104)

Furthermore, if there was any failure to invoke the suspension rule, as outlined by the contract, this would have nothing to do with any alleged waiver of the question of coverage while the policy or the con-

tract was in default. It would merely mean that the insured would have a right, or might have a right to re-instatement any time up until he was actually cancelled out by suspension.

Now, as to the refusals of the court to give requested instructions, I except to the refusal of the court to instruct the jury, as a matter of law, that the policy at the time of the death of Mr. Campbell, July 12, 1938, was not paid, and that there were no premiums paid on it at that time. I think the record is undisputed on this fact; and inasmuch as the case went to the jury purely on the question of waiver and claimed reliance, I think we have a right to have the jury told specifically that there were no premiums paid.

I except further to the refusal to give requested instruction No. 4, in which the defendant requested the jury be instructed that, unless it could find that the defendant pursued some course of conduct in the acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and the constitution and by-laws, there could be no waiver or estoppel. I think that this is clearly a correct statement of the law. If the jury find only that what the defendant did was provided for as a right or obligation on the part of one or both of the parties to the contract, then obviously there could be no waiver or estoppel. Therefore I think it is rather prejudicial not to give that instruction. (Tr. 105) [79]

I except to the failure to give requested instruction No. 5, which again would have advised the jury that if the jury merely found that the defendant did only those things which it was entitled to do under its contract, or was bound to do by the provisions thereof, there could be no waiver. It seems to me that there is the whole question here under the evidence. The jury might well find that the acceptance of all the premiums was done in compliance with the specific provisions of the contract; and if so, certainly there could be no waiver or estoppel. I therefore except on the grounds it is highly prejudicial to refuse the request. (Tr. 106)

Instructions No. 4 and 5 requested by the defendant and refused by the court are as follows:

No. 4

You are instructed that unless you find from the evidence that the defendant in this case pursued some course of conduct in the acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and constitution and by-laws, then there can be no waiver or estoppel.

No. 5

You are instructed that if you find that the defendant did only those things which it was entitled to do under the provisions of the insurance certificate and constitution and by-laws, then there can be no waiver or estoppel in the case.

VERDICT

We, the jury in the above entitled cause, find for the plaintiff and fix the amount of her recovery in the sum of \$5,000.00.

[Endorsed]: Filed Jun 18, 1940. [80]

[Title of District Court and Cause.]

STIPULATION ON CONTENTS
OF RECORD ON APPEAL

Pursuant to Rule 75 (f) of the Rules of District Courts it is hereby stipulated and agreed between the parties hereto, through their respective attorneys of record, that the record on appeal to be certified by the Clerk of the above entitled court and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit shall contain the following parts of the record, proceedings and evidence:

1. Complaint.
2. Petition for Removal to Federal Court.
3. Order for Removal to Federal Court.
4. Bond on Removal.
5. Amended Answer.
6. Amended Reply.
7. Demand for Jury Trial.
8. Request for Admission under Rule 36.
9. Stipulation on Trial.

10. Verdict.
11. Judgment.
12. Motion for Judgment N. O. V.
13. Motion for New Trial.
14. Order Denying Motion for Judgment N.O.V.
and New Trial.
15. Notice of Appeal.
16. Supersedeas and Cost Bond on Appeal.
17. Order Forwarding Original Exhibits.
18. Stipulation Extending Time for Filing Record on Appeal.
19. Order Extending Time for Filing Record on Appeal.
20. Stipulation Regarding Printing of Record.
21. Statement of Points on Appeal.
22. Plaintiff's Exhibits "1" to "7", inclusive.
23. Defendant's Exhibits "B-1" to "B-6", inclusive.
24. Reporter's Transcript of Evidence and Proceedings.
25. Plaintiff's Abstract of Testimony.
26. This stipulation.

It is further stipulated and agreed that the plaintiff's [81] abstract of testimony shall be printed in the record on appeal in lieu of the reporter's transcript.

It is further stipulated and agreed that the parts of the exhibits as set forth in the record on appeal include all the necessary and pertinent parts of the

various exhibits introduced necessary to the court's consideration of the questions raised in this appeal.

JONES & BRONSON,
WHEELER GREY,

Attorneys for Plaintiff.

W. R. McKELVY &

FREDERICK V. BETTS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 12, 1940. Millard P. Thomas, Clerk. By R. Elias, Deputy. [82]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 193, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of

record and on file in the office of the Clerk of said District Court at Seattle, except as to the Reporters Transcript of proceedings at trial, the original of which is enclosed herewith, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 539 folios at .5¢.....	\$ 26.95
Appeal fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record50
<hr/>	
Total	\$ 32.45

I hereby certify that the above cost for preparing and certifying record, amounting to \$32.45, has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 21st day of June, 1940.

[Seal]

MILLARD P. THOMAS,

Clerk of the United States
District Court for the West-
ern District of Washington.

By R. ELIAS,

Deputy.

[Endorsed]: No. 9557. United States Circuit Court of Appeals for the Ninth Circuit. The Order of United Commercial Travelers of America, Appellant, vs. Estelle Campbell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 24, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9557

THE ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA,

Appellant,

vs.

ESTELLE CAMPBELL,

Appellee.

STATEMENT OF POINTS ON APPEAL

Comes now the appellant, The Order of United Commercial Travelers of America, and files this statement of points on which it intends to rely on its appeal from a certain final judgment of the District Court of the United States for the Western District of Washington, Northern Division in Cause No. 20, entitled “Estelle Campbell, Plaintiff v. The Order of United Commercial Travelers of America, Defendant”, as follows:

1. That as a matter of law the District Court erred in failing to direct a verdict for the defendant in said cause at the close of all the evidence where the evidence affirmatively showed that the deceased, Robert H. Campbell, was doing those things which he had a contractual right to do, and where there was no showing that the defendant at any time had waived its rights under the policy upon which said suit was predicated;

2. That as a matter of law the plaintiff in said cause failed to prove by the evidence any of the ele-

ments of the doctrine of waiver and estoppel and failed to establish a jury question relative to that subject;

3. All of the court's instructions to the jury in said cause on the question of estoppel and waiver are erroneous in this case where the deceased had an affirmative contractual right and was exercising that right and where there was no showing that the defendant did any more or less than was provided for under the terms of the insurance contract in said cause.

W. R. McKELVY &

FREDERICK V. BETTS,

Counsel for Appellant.

June 3, 1940. Copy received.

JONES & BRONSON.

[Endorsed]: Filed Jun. 24, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above entitled Court:

For a record on appeal herein, the appellant hereby requests that you do print the entire transcript of record on the above appeal as certified to you by the clerk of the District Court of the United

States, for the Western District of Washington,
Northern Division.

Respectfully submitted.

W. R. McKELVY &

FREDERICK V. BETTS,

Counsel for Appellant.

June 3, 1940. Copy received.

JONES & BRONSON.

[Endorsed]: Filed Jun. 24, 1940. Paul P. O'Brien,
Clerk.

